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JAMES H. McKENNEY,
Clerk.

No. 481 Ex. 175

Y. of Baxter for Appts.

Filed Feb. 24, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 481.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY, ET AL., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

ARGUMENT OF

ED. BAXTER, of Counsel for Appellants.

20307

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1 Ann. Rep., I. C. C. (1887).....pp. 136, 167, 171, 192, 203.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 481.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY, ET AL., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Argument of ED. BAXTER, of Counsel for Appellants.

STATEMENT OF THE CASE.

I.

The Decree Appealed From.

The appellants The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company appeal from a decree rendered by the United States Circuit Court of Appeals for the Sixth Circuit on the 13th day of November,

1899 (Trans. p. 393), which affirmed a decree rendered by the Circuit Court of the United States for the Eastern District of Tennessee at Chattanooga on the 2d day of February, 1898 (Trans. p. 381), which latter decree affirmed a certain order made by the Interstate Commerce Commission, which ordered the appellants, and certain other common carriers, to cease and desist from "charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore or other North Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. p. 57.

The Assignment of Errors filed by the appellants will be found in

Trans. p. 394, et seq.

The opinion of the Commission will be found in

Trans. p. 37.

The opinion of the Circuit Court will be found in

Trans. p. 367.

The opinion of the Court of Appeals will be found in

Trans. p. 402.

II.

Proceedings Before the Commission. The Petition.

The Board of Trade of Chattanooga, Tenn., filed a petition before the Interstate Commerce Commission, against the appellants, and certain other railroad and steamship companies, in which it was averred, among other things:

First: That the defendants to said petition (the appellants) are common carriers engaged in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland, to points in the State of Tennessee.

Trans. p. 9.

Second: That said appellants separately and jointly have

been and are now transporting property, and participating in through rates of freight charges for transporting the same, from Boston, New York, Philadelphia, and Baltimore, to Nashville, Memphis and Chattanooga; which three last named cities compete for business in the same territory.

Trans. p. 9.

Third: That said appellants transport property from Boston, New York, Philadelphia, and Baltimore, through Chattanooga, to Nashville and Memphis; that said two last named cities are respectively 151 and 310 miles farther distant than Chattanooga from Boston, New York, Philadelphia, and Baltimore; and that said appellants charge lower rates to Nashville and Memphis than they charge to Chattanooga.

Trans. p. 10.

Fourth: That the rates charged by said appellants to Chattanooga are too high in themselves, and, therefore, violate the first section of the Act to Regulate Commerce.

Trans. p. 10.

Fifth: That said rates are too high in comparison with the rates charged by said appellants to Nashville and Memphis; that they unjustly discriminate against the merchants of Chattanooga in favor of the merchants of Nashville and Memphis, and, therefore, violate the second section of said Act.

Trans. p. 10.

Sixth: That the lower rates charged by said appellants to Nashville and Memphis constitute an undue preference of the merchants of those cities over the merchants of Chattanooga, and, therefore, violate the third section of said Act.

Trans. p. 10.

Seventh: That transportation from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, is conducted under substantially the same circumstances and conditions as transportation to Nashville and Memphis, and, therefore, the charging of higher rates for the shorter distance to Chattanooga than for

the longer distance to Nashville and Memphis violates the fourth section of said Act.

Trans. pp. 9, 10.

III.

Proceedings Before the Commission. Answers of the Defendants.

All of the defendants to said petition, except three, filed answers thereto. The appellants, the East Tennessee, Virginia & Georgia Railway Co. and the Norfolk & Western Railroad Co. filed a joint and several answer.

First: They admitted that they are common carriers engaged in the transportation of passengers and property by railroad from Boston, New York, Philadelphia and Baltimore, to Chattanooga, Nashville, and Memphis.

Trans. p. 14.

Second: They admitted that they are participating in through rates of freight charges from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, Nashville, and Memphis.

Trans. p. 14.

Third: They admitted that they are engaged in the transportation of property from Boston, New York, Philadelphia, and Baltimore, through Chattanooga, to Nashville and Memphis; they admitted that said two last named cities are respectively 151 and 310 miles farther distant than Chattanooga, from Boston, New York, Philadelphia and Baltimore; and that said defendants charge lower rates to Nashville and Memphis than they charge to Chattanooga.

Trans. pp. 14, 15.

Fourth: They denied that the rates charged by them to Chattanooga are too high in themselves; and they denied that said rates violate the first section of the Act to Regulate Commerce.

Trans. p. 15.

Fifth: They denied that said rates are too high in comparison with the rates charged by them to Nashville and Memphis; they denied that said rates unjustly discriminate against the merchants of Chattanooga, in favor of the merchants of Nashville and Memphis; and they denied that said rates violate the second section of said Act.

Trans. p. 15.

Sixth: They denied that the lower rates charged by them to Nashville and Memphis constitute an undue preference of the merchants of those cities over the merchants of Chattanooga; and they denied that said rates violate the third section of said Act.

Trans. p. 15.

Seventh: They denied that transportation from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, is conducted under substantially the same circumstances and conditions as transportation to Nashville and Memphis; and they denied that the charging of higher rates for the shorter distance to Chattanooga, than for the longer distance to Nashville, and Memphis, violates the fourth section of said Act.

Trans. pp. 14, 15.

IV.

Proceedings Before the Commission. Its Findings of Fact. The Appellants' Lines from North Atlantic Seaboard to Chattanooga, Nashville and Memphis.

Testimony was taken before the Commission; and it filed its report and opinion, in which it finds as facts, among other things, the following, viz.:

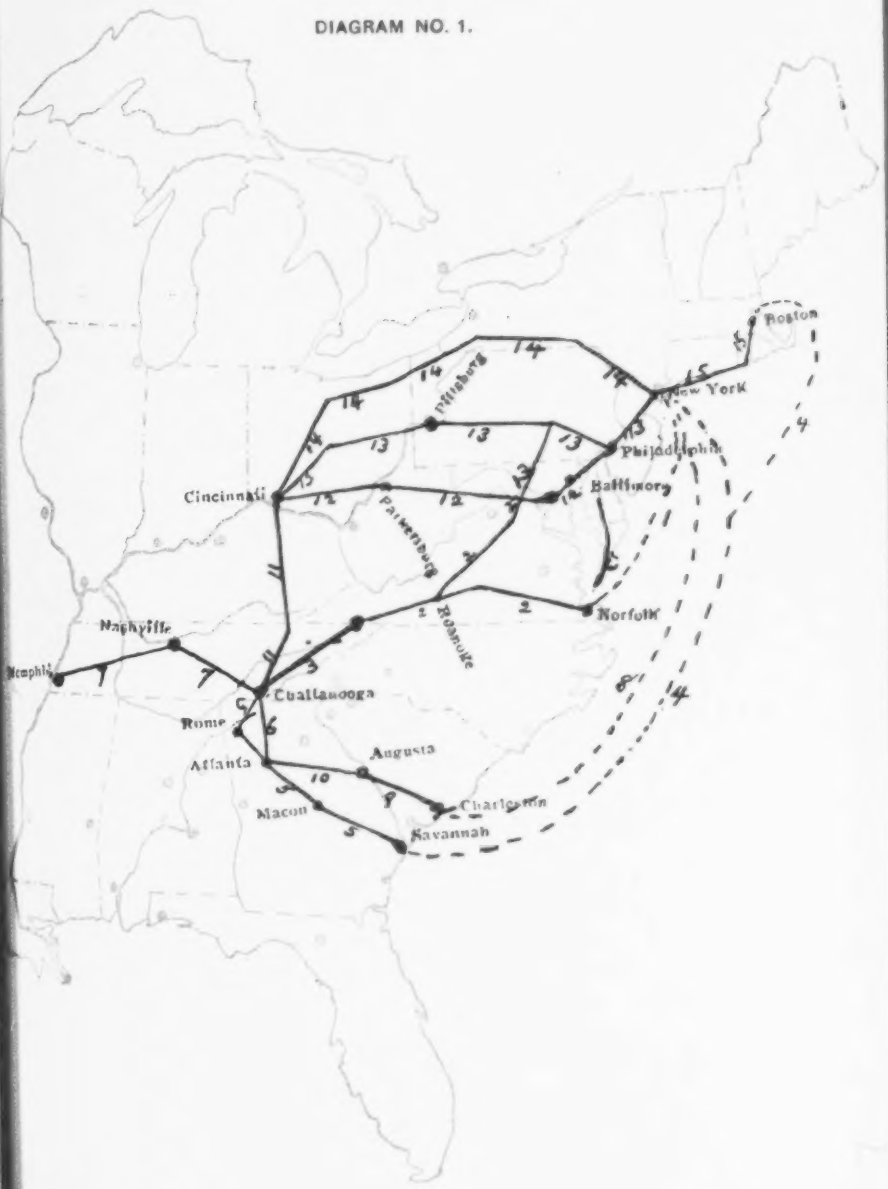
First: The Commission finds and reports that the following named defendants are severally common carriers, engaged in interstate commerce, as parts of through lines, and under joint tariffs of rates, to Chattanooga, Nashville, and Memphis, Tennessee. The lines of said defendants are shown on Diagram No. 1; and they are numbered on said diagram as in the page preceeding said diagram.

INDEX TO DIAGRAM NO. 1.

No. 1. Old Dominion Steamship Line.
No. 2. Norfolk & Western R. R.
No. 3. East Tennessee, Virginia & Georgia R'y.
No. 4. Ocean Steamship Line.
No. 5. Central Railroad & Banking Co. of Georgia.
No. 6. Western & Atlantic R. R.
No. 7. Nashville, Chattanooga & St. Louis R'y.
No. 8. Clyde Steamship Line.
No. 9. South Carolina R'y.
No. 10. Georgia R. R.
No. 11. Cincinnati, New Orleans & Texas Pacific R'y.
No. 12. Baltimore & Ohio R. R.
No. 13. Pennsylvania Co.; and Pennsylvania R. R. Co.
No. 14. New York, Lake Erie & Western R. R.
No. 15. New York & New England R. R.

Trans. p 41.

DIAGRAM NO. 1.


Boston
New York
Pittsburg
Philadelphia
Baltimore
Cincinnati
Parkersburg
Norfolk
Roanoke
Nashville
Memphis
Chattanooga
Rome
Atlanta
Augusta
Macon
Charleston
Savannah

V.

The Commission's Finding as to the Transportation Lines from the North Atlantic Seaboard to Nashville.

The Commission finds and reports that "there are a number of routes by which traffic from the Eastern Seaboard is carried to Nashville. The-e may be separated into two classes, or groups; one consisting of the lines passing through Chattanooga (which lines are shown in Diagram No. 1), the other of the lines passing through Cincinnati, Louisville, Evansville, and possibly other points north of Chattanooga."

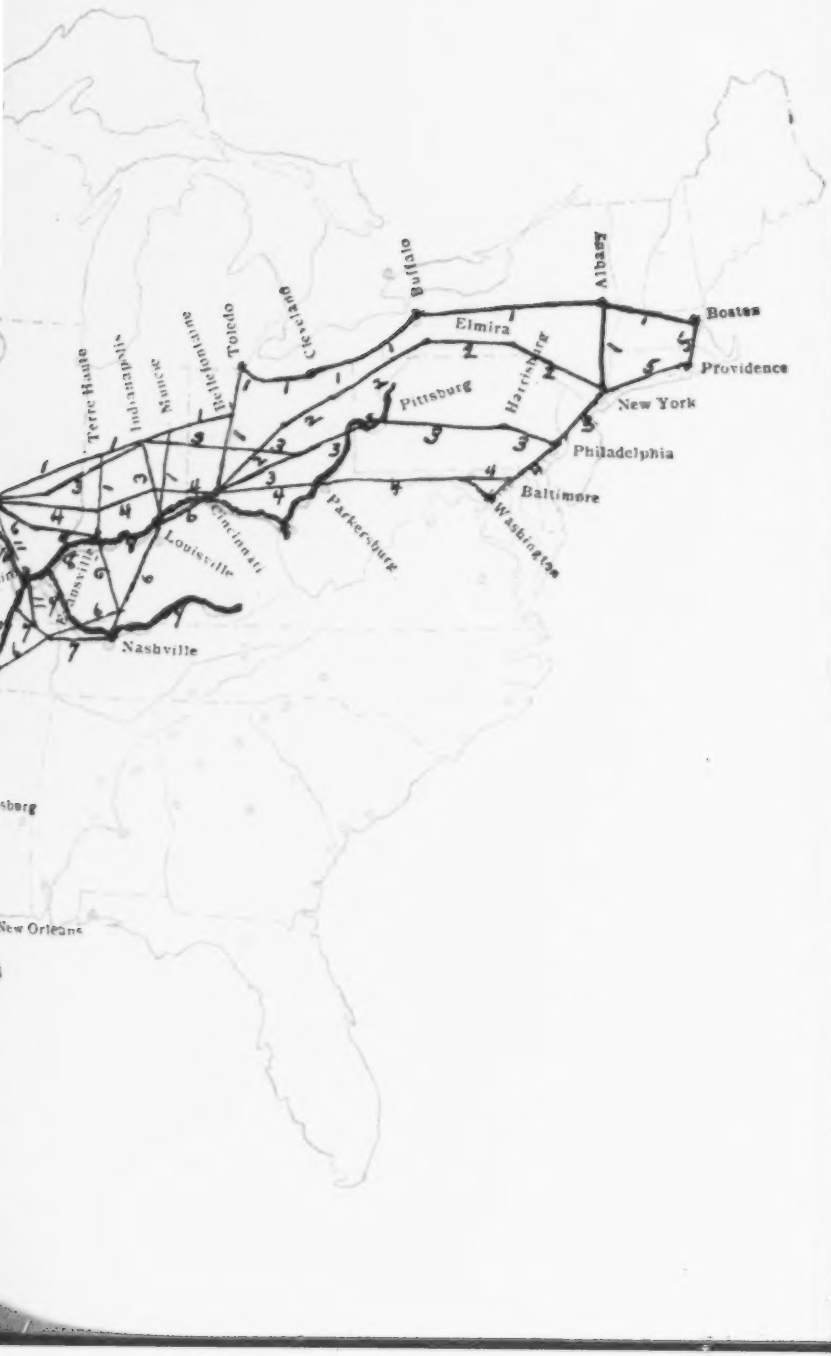
Trans. p. 42.

The lines by which traffic from the Eastern Seaboard can be carried to Nashville through Cincinnati, Louisville, Evansville, and other points north of Chattanooga, are shown on Diagram No. 2; and they are numbered on said diagram, as in the page preceeding said diagram.

INDEX TO DIAGRAM NO 2.

No. 1. New York Central R. R. and connections.
No. 2. Erie R. R. and connections.
No. 3. Pennsylvania R. R. and connections.
No. 4. Baltimore & Ohio R. R. and connections.
No. 5. New York & New England R. R.
No. 6. Louisville & Nashville R. R.
No. 7. Nashville, Chattanooga & St. L. R'y.
No. 8. Ohio River.
No. 9. Cumberland River.
No. 10. Mississippi River.
No. 11. Mobile & Ohio R. R.

DIAGRAM NO. 2.


Buffalo
Albany
Boston
Elmira
Providence
Cleveland
Toledo
Terre Haute
Indianapolis
Muncie
Pittsburg
Harrisburg
New York
Philadelphia
Baltimore
Washington
Cincinnati
Parkersburg
Louisville
Nashville
New Orleans

VI.

The Commission's Finding as to How the Nashville Traffic is Divided Between the Different Routes.

The Commission finds and reports that it was not very definitely shown how the aggregate through business (from the Eastern Seaboard) to Nashville is divided between said different groups (or lines), but that "it is fairly inferable from the evidence that the lines *through Chattanooga* carry fifty to sixty per cent. of the total tonnage."

Trans. p. 42.

The Commission also finds and reports that "the seaboard traffic which is carried to Nashville *through Chattanooga* reaches the latter place by several different routes. The most important of these appears to be the East Tennessee, Virginia & Georgia Railway, with its eastern connections by rail and water. The water portion of this route is by the vessels of the Old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western Railroad, which extends to Bristol, Tennessee, the eastern terminus of the East Tennessee, Virginia & Georgia; the rail portion of this route consists of the Pennsylvania system and possibly other lines reaching Roanoke, Va., on the main line of the Norfolk & Western by way of the Shenandoah Valley." . . . . "Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta; and a third route is by the Ocean Steamship Company to Savannah, and thence by rail through Macon and Atlanta. There is no testimony in the case indicating the relative portion of Nashville traffic *via Chattanooga* which passes by either of these routes, but our understanding is that the greater portion of it goes by the one first above described," i. e., the route via the E. T., V. & Ga. Ry. and its connections.

Trans. pp. 43, 44.

All three of said routes are shown on Diagram No. 1.

VII.

THE COMMISSION'S FINDING AS TO THE TRANSPORTATION LINES FROM THE NORTH ATLANTIC SEABOARD TO MEMPHIS.

The Commission finds and reports that "the traffic from Atlantic seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all-rail lines through Cincinnati, Louisville, Evansville," etc.

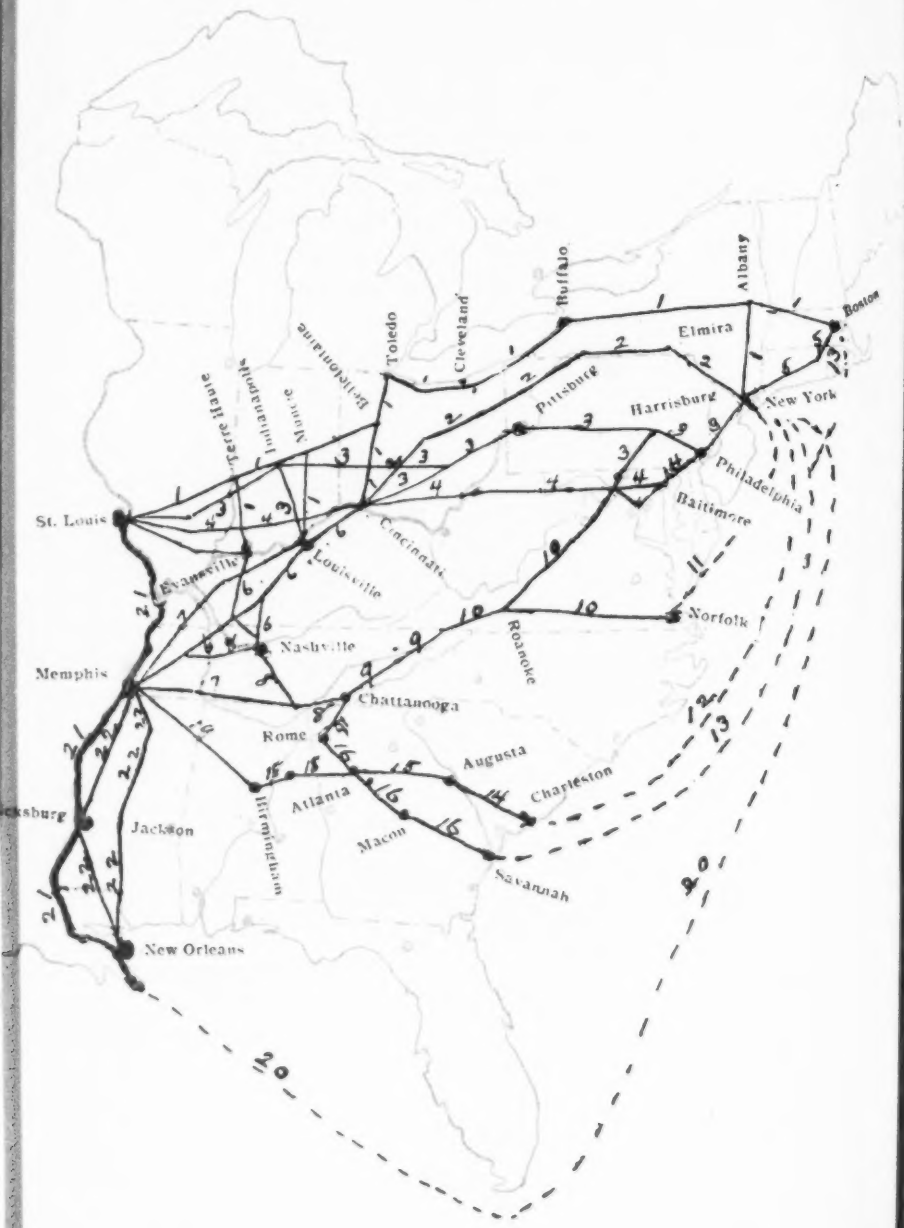
. . . . "A second route is the one through Chattanooga, formed by the East Tennessee, Virginia & Georgia Railway, with its eastern connections, and requires no further description. Two other routes are those already mentioned by way of Charleston and Savannah respectively. The Memphis traffic by the last named routes does not necessarily go through Chattanooga, but may take a shorter course from Atlanta by way of Birmingham. In addition to these is the ocean route to New Orleans, and thence to Memphis by rail, or by river."

Trans. p. 44.

The lines by which traffic from Atlantic Seaboard points can be carried to Memphis are shown on Diagram No. 3; and they are numbered on said diagram as in the page following said diagram.

20318

DIAGRAM NO. 3.



INDEX TO DIAGRAM NO 3.

No. 1. New York Central R. R. and connections.
No. 2. Erie R. R. and connections.
No. 3. Pennsylvania R. R. and connections.
No. 4. Baltimore & Ohio R. R. and connections.
No. 5. New York & New England R. R.
No. 6. Louisville & Nashville R. R.
No. 7. Chesapeake, Ohio & Southwestern R. R.
No. 8. Nashville, Chattanooga & St. Louis R'y.
No. 9. East Tennessee, Virginia & Georgia R'y.
No. 10 Norfolk & Western R. R.
No. 11. Old Dominion Steamship Line.
No. 12. Clyde Steamship Line.
No. 13. Ocean Steamship Line.
No. 14. South Carolina R'y.
No. 15. Georgia R. R.
No. 16. Central Railroad & Banking Co. of Georgia.
No. 17. Memphis & Charleston R. R.
No. 18. Georgia Pacific R. R.
No. 19. Kansas City, Memphis & Birmingham R. R.
No. 20. Ocean Route, New York to New Orleans.
No. 21. Mississippi River.
No. 22. Illinois Central R. R.

VIII.

The Commission's Finding as to the Transportation Lines from the North Atlantic Seaboard to Chattanooga.

The Commission finds and reports that there are "several routes by which shipments *terminating at Chattanooga* reach their destination. A portion of this traffic goes by the trunk lines to Cincinnati, and thence by the Cincinnati Southern Railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company." (See Diagram No. 1) . . . . . "Another portion of the Chattanooga traffic goes by the route formed by the lines of the East Tennessee, Virginia & Georgia Railway, and its eastern connections by rail and water hereinbefore mentioned. The other routes by which Chattanooga shipments reach their destination, are those reached by water and rail through Charleston and Savannah, respectively, which have already been sufficiently described." (See diagram No. 1.)

Trans. pp. 44, 45.

The Commission reports that there is no proof showing the relative amount of Chattanooga shipments by either of the routes mentioned; but it says: "Our impression, however, is that the larger portion of this traffic goes by the Cincinnati route and by the route of the East Tennessee, Virginia & Georgia Railway and its connecting lines."

"There may be other routes, or lines, by which traffic from the Atlantic Seaboard reaches Nashville, Memphis, or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. *The rates to each of these towns are the same by whatever route the transportation is effected, except the rate to Memphis, via New Orleans.*"

Trans. p. 45.

IX.

The Commission's Finding as to How Rates Are Made From the North Atlantic Seaboard to Nashville.

The Commission finds and reports with reference to the rates from the North Atlantic Seaboard to Nashville that:

"*The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the appellant Lines.* The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines and the Louisville & Nashville System, whose northern termini are at points on the Ohio River which receive Trunk Line rates on eastern shipments."

Trans., p. 49.

The Commission also finds and reports that:

"The rates from New York and Boston to Cincinnati are:

Classes	1	2	3	4	5	6
Rates	65	57	44	30	26	22

"From the same points to Louisville the rates are:

Classes	1	2	3	4	5	6
Rates	75	65	50	35	30	25

"And to Evansville:

Classes	1	2	3	4	5	6
Rates	83	72	55	39	33	28

"*The above charges are imposed for carrying the traffic to these towns respectively, whether the transportation terminates there or is continued to Nashville; in other words, the lines east of these points (i. e., Cincinnati, Louisville and Evansville) receive the same compensation in either case.* The through rate to Nashville, hereinbefore stated, is less than the local rates from these several places (*i. e.*, Cincinnati, Louisville and Evansville) plus the Trunk Line rates from the seaboard to each of them respectively, that is, less than the amount produced by adding the locals from Cincinnati, Louisville or

Evansville (to Nashville) to the eastern rates severally applied to those towns (i. e., Cincinnati, Louisville and Evansville). For this reason, the Nashville rate may be said to be made by 'arbitrary' additions to the Trunk Line rates to the intermediate points (i. e., Cincinnati, Louisville & Evansville). On the other hand, a comparison of these additions with the distances to Nashville from the several points mentioned (i. e., Cincinnati, Louisville and Evansville) shows that they give substantially the same rate per ton per mile in each case—one and seven-tenths cents—as the Trunk Line rate per ton per mile east of those points (i. e., Cincinnati, Louisville and Evansville). *Practically, therefore, the Nashville rate by the several routes now under consideration (i. e., the routes via the Ohio river crossings), is an extension of the Trunk Line rate to that point (i. e., Nashville) the total charge being divided between the several carriers in nearly the exact proportion to the mileage operated by each.*"

Trans. pp. 42-43.

"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, *the difference resulting mainly from the much greater volume of traffic in the latter section.*"

Trans. p. 48.

"*The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc.*, all of which are interstate carriers, subject to the Act to Regulate Commerce. *These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

X.

THE COMMISSION'S FINDING AS TO HOW RATES ARE MADE FROM THE NORTH ATLANTIC SEABOARD TO MEMPHIS.

The Commission finds and reports that:

"The traffic from Atlantic Seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all-rail lines through Cincinnati, Louisville, Evansville, etc. The Memphis through rate is the Trunk Line rate to Cincinnati, etc., plus certain additions which are less than the local rates from those points (i. e., Cincinnati, Louisville and Evansville) to Memphis."

"A comparison of these additions with the distances from Cincinnati, etc., shows that *the Memphis through rate, like the Nashville through rate, is in effect an extension of the Trunk Line rate* to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage."

Trans. p. 44.

XI.

THE COMMISSION'S FINDING AS TO HOW RATES ARE MADE FROM THE NORTH ATLANTIC SEABOARD TO CHATTANOOGA.

The Commission finds and reports that:

"As appear from tariffs on file with the Commission, the following cities and towns, among others, are grouped with Chattanooga and take the same *rail and water* rates on classified traffic, to wit:

"Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines and Griffin in the State of Georgia; Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the State of Alabama; and Enterprise and Meridian, in the State of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford,

Opelika and Eufaula have higher *all-rail* class rates than Chattanooga, ..."

Trans. p. 48.

"The rates to Chattanooga and the above-named common points, both *rail and water* and *all rail, are established by the Southern Railway & Steamship Association*, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association. The traffic to Nashville and Memphis, however, irrespective of the route by which it is transported, is governed by the Official or Trunk Line Classification."

Trans. p. 48.

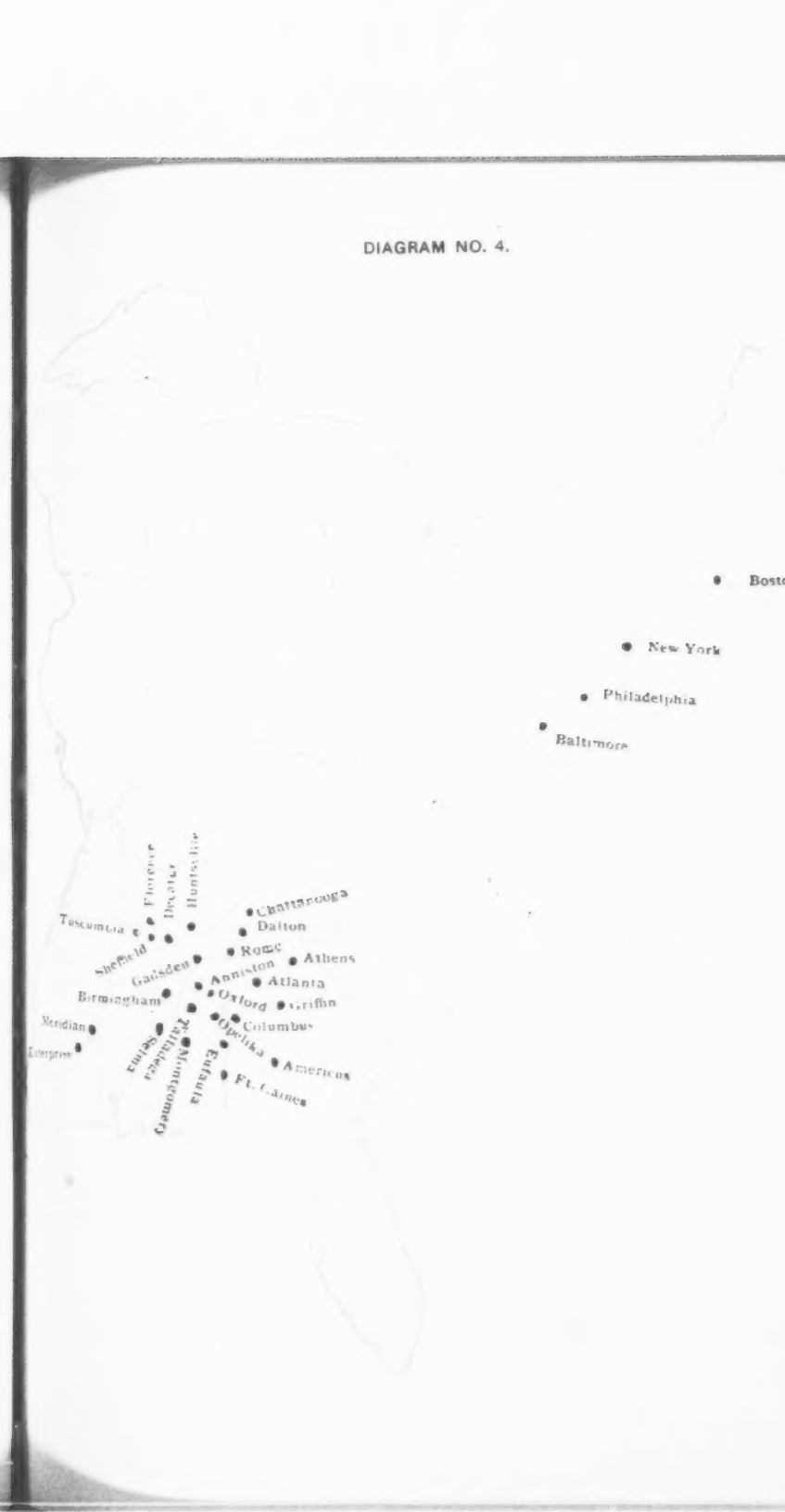
"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, *the difference resulting mainly from the much greater volume of traffic in the latter section;* and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

Chattanooga and the Southern cities and towns with which she is grouped for the purpose of making rates from the North Atlantic Seaboard are shown on Diagram No. 4.

The Commission also finds and reports that a portion of the traffic from the North Atlantic Seaboard to Chattanooga "goes by the Trunk Lines to Cincinnati, and thence by the Cincinnati Southern Railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company. The through rates by this route, as in the case of Nashville and Memphis, is made by adding to the Trunk Line rates to Cincinnati certain amounts which represent the proportion of the total charge taken by the carrier from Cincinnati to Chattanooga (i. e., the C., N. O. & T. P. Ry. Co.). The additions so made give a considerably greater rate per ton per mile for this portion of the haul than the Trunk Line rate east of Cincinnati, but they are, at the same time, ma-

DIAGRAM NO. 4.


Bost
New York
Philadelphia
Baltimore
Florence
Decatur
Huntsville
Tuscumbia
Sheffield
Chattanooga
Dalton
Rome
Gadsden
Anniston
Athens
Atlanta
Birmingham
Oxford
Griffin
Meridian
Talladega
Columbus
Opelika
Enterprise
Eufaula
Americus
Montgomery
Ft. Gaines

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terially less than the local rates between those points" (i. e., between Cincinnati and Chattanooga).

Trans. p. 44.

XII.

The Commission's Finding as to the Relative Rates from New York and Boston to Chattanooga, Nashville and Memphis, Respectively.

The Commission finds and reports that:

"The following are the through rates from New York and Boston to Chattanooga, Nashville and Memphis, respectively:

Classes	1	2	3	4	5	6
To Chattanooga	114	98	86	73	60	49
To Memphis, 310 miles farther	100	85	65	45	38	35
To Nashville, 151 miles farther	91	78	60	42	36	31

"It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six numbered classes, respectively, by 23 cents, 20 cents, 26 cents, 31 cents, 24 cents, and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents, and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from Eastern Seaboard points through Chattanooga—the distance to Nashville being 151 miles, and to Memphis 310 miles, farther than to Chattanooga."

Trans. p. 42.

XIII.

The Commission's Finding as to the Effect Produced by the Disparity of Rates Upon the Commerce of Chattanooga.

The Commission finds and reports that:

"The city of Chattanooga is in Southeastern Tennessee, on the river bearing the same name as the State. *During the last ten years, especially, its growth has been extremely rapid, and it has*

become a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country, largely in the same territory as Nashville, and also, to some extent, in the same territory as Memphis. By reason of the disparity in charges on shipments from the east, in favor of Nashville and Memphis, Chattanooga is placed at serious disadvantage in this competition and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city, which would naturally result from the development of its wholesale trade.

"Under the tariffs now in force, goods may be carried from the east through Chattanooga to Nashville, and back through Chattanooga to points south and east, and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a carload of first-class freight, 40,000 pounds, the charges to Chattanooga, at $1.14 per hundred, amount to $456.00; while to Nashville, at 91 cents, the charges are only $364.00, making a difference of $92.00 in favor of Nashville, the longer haul by 151 miles. On fourth-class freight the advantage in favor of Nashville is $124.00 per car, and on sixth-class, $72.00. The advantage in favor of Memphis, a longer haul by 310 miles, is also large.

Trans. p. 47.

"The proportion of the Nashville through rate, charged on a ton of first-class goods from Cincinnati to Nashville, via the Louisville & Nashville Railroad, a distance of 295 miles, is $5.20, while the proportion of the Chattanooga through rate, charged from Cincinnati to Chattanooga, via the Cincinnati Southern Railway, a distance of 335 miles (only 40 miles further), is $9.80.

"It is quite unnecessary to multiply examples showing the differences resulting from these relative rates in the transportation charges on eastern merchandise to these several towns.—(Chattanooga, Nashville and Memphis), as their necessary effect in limiting the distance to which distribution from Chattanooga

can be profitably effected, is sufficiently obvious without further illustration."

Trans. p. 48.

XIV.

The Commission's Finding That There is no Water Competition at Nashville.

The Commission finds and reports that:

"There are no through lines by water from Cincinnati to Nashville, but a few boats are run from Cincinnati to Paducah, Ky., and two or three a week, carrying from six to eight carloads each, from Paducah to Nashville. Boats are unloaded and loaded again at Paducah. No eastern business of any consequence is done, and these water lines have no agents to solicit eastern trade. Their traffic is from Ohio River points. The Atlantic Seaboard shipments to Nashville by way of *Cincinnati* are carried wholly by rail.

Trans. p.p. 48, 49.

"The lower Cumberland River, on which Nashville is situated, is navigable about nine months in the year, and boats run that number of months on an average. Many years ago, before the days of railroads, there were through lines of boats to Nashville from Cincinnati and other cities, but they have all been discontinued *on account of the rates and facilities afforded by the railroads.* The railroads have the advantage in time, insurance and handling. If goods were shipped from the east and sent by water from *Cincinnati* to Nashville, they would have to be unloaded from the cars and loaded in boats at Cincinnati, and loading and unloading would also be necessary at Paducah. A through line of boats was established and kept up with difficulty for some time after the war, but was long ago abandoned. The uncertainty of return cargoes from Nashville would apparently prevent the maintenance of such a line of boats at the present time, even if secured against a reduction of rates by the railroads.

"The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville *via Chattanooga* are not forced upon them by any *water* competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between *Cincinnati* and Nashville.

Trans p. 49.

"As already stated, the through rate to Nashville by the Cincinnati route is made by certain additions to the Trunk Line rate from the east to the latter point. *The amount of such additions was doubtless fixed originally with reference to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures.* But we are far from satisfied, and refuse to find on the evidence in this case, that there is any actual *water* competition for traffic from Atlantic points to Nashville, or that the Louisville & Nashville Road is forced to take such traffic at the compensation now received by it, because of river communication between *Cincinnati* and Nashville, furnishing the opportunity for such competition. *The river rates between those places are now considerably lower than the rail rates,* and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. *There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati.* What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by *water competition* at that point, either actually encountered or seriously apprehended."

Trans. pp. 49, 50.

It will be noticed that the Commission's finding is restricted to water competition from *Cincinnati* to Nashville; and that no

consideration is given by the Commission to competition by water from *Evansville* to Nashville.

XV.

The Commission's Finding as to the Rail Competition that Exists at Nashville; and as to its Effect Upon Appellants' Rates to Nashville.

The Commission finds and reports that:

"*The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines.* The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines and the Louisville & Nashville system, whose northern termini are at points on the Ohio River, which receive Trunk Line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc., all of which *are interstate carriers, subject to the Act to Regulate Commerce.* These carriers established rates and united in joint tariffs from eastern points to Nashville *long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

Again the Commission says:

"In other words, the real competitors of the defendants for this transportation are the all-rail carriers reaching Nashville by way of Cincinnati, and those carriers *are confessedly amenable to the Act to Regulate Commerce.*"

Trans. p. 52.

Again the Commission says:

"It is stated in the foregoing findings that *the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the large percentage of Nashville business, which they now secure.* In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classification by which they are severally affected, *and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory*, are existing conditions which govern, to some degree, at least, the transportation in question. *For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control* AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

XVI.

The Commission's Finding That the Nashville Rate Yields a Profit Over the Additional Cost of Movement.

The Commission finds and reports that:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, *with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence.*"

Trans. p. 51.

XVII.

The Commission's Finding as to the Water Competition That Exists at Memphis and as to its Effect Upon Appellants' Rates to Memphis.

The Commission finds and reports that:

"The defendant lines actually meet water competition at that point which is direct and to a large degree controlling. The heavy shipments from the Atlantic Seaboard to Memphis go for the most part by way of New Orleans, and the carriers complained of in this proceeding make little effort to compete with the water lines on traffic of that description. At least a third of the entire volume of eastern merchandise appears to reach Memphis by ocean steamer to New Orleans, and thence by water or rail to destination."

Trans. p. 50.

XVIII.

The Conclusion of Law Reported by the Commission to the Effect that the Appellants Have no Right to Take Into Consideration the Rail Competition at Nashville.

The Commission says:

"In other words, the real competitors of the defendants for this transportation are the *all-rail* carriers reaching Nashville by way of Cincinnati, and those carriers are confessedly *amenable to the Act to Regulate Commerce*. If these views are correct, they control, prima facie at least, the determination of this case, for the primary question involved has been recently decided by the Commission."

Trans. p. 52.

"In a series of proceedings instituted by the Georgia Railroad Commission, we have taken occasion to review, with much care, the fourth section of the Statute, familiarly known as 'the

long and short haul clause,' and have given it a construction intended to have general application.

Ga. R. R. Com. vs. Clyde Steamship Company et al., 4 Inters. Com. Rep. 120, 5 I. C. C. Rep., 324.

"The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the Report of the Commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

'The carrier has the right to judge, in the first instance, whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers *not subject to regulation under the Act to Regulate Commerce.* In other cases under the fourth section, the circumstances and conditions are not, presumptively, dissimilar, and carriers must not charge less for the longer distance, except upon the order of this Commission.'

"This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of the defendants for the Nashville traffic in question are themselves interstate carriers by rail and *subject, in all respects, to the Act to Regulate Commerce.*

Trans. pp. 52, 53.

XIX.

The Conclusion of Law Reported by the Commission in Regard to the Reasonableness of the Chattanooga Rates.

The Commission says:

"*These lines* (i. e., the appellants') *are under compulsion, therefore, to meet the rates which other carriers have established, or leave those*

carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying system of classifications by which they are severally affected, *and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory*, are existing conditions which govern, to some degree at least, the transportation in question. *For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and* THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT (I. E., CHATTANOOGA) MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

"*It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate*, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable. On the contrary, we firmly believe that the eastern rates to this point (i. e., Chattanooga) can be materially reduced without injustice to the defendants and without serious disturbance to the general scheme of tariff construction with which that rate is connected. Compared with rates to other points and on other lines, for similar distances and a corresponding volume of traffic, the rate to Chattanooga seems extremely liberal, to say the least; *while a strong presumption of its unreasonableness is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote.* When these carriers, for instance, charge 73 cents per hundred pounds on fourth-class freight from New York to Chattanooga, and at the same time carry like shipments 150 miles further to Nashville for 42 cents a hundred, and do this not incidentally, but

for a series of years, the belief that the higher rate is excessive becomes a positive conviction."

Trans. p. 54.

"We entertain little doubt, therefore, that equity between shipper and carrier requires *some* reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, AS THE AMOUNT TO WHICH THE CHATTANOOGA RATE SHOULD BE REDUCED WILL NOT NOW BE DECIDED."

Trans. pp. 54, 55.

Again the Commission says:

"In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirement of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. *The question which may arise, if permission is sought to depart from the general rule relating to long and short hauls, was not specially discussed.* On this ground, also, IT WOULD SEEM SUITABLE TO ALLOW OPPORTUNITY FOR A FURTHER HEARING BEFORE FIXING MAXIMUM RATES ON SHIPMENTS TO CHATTANOOGA."

Trans. p. 55.

XX.

THE ORDER MADE BY THE COMMISSION.

On December 30, 1892, the Commission ordered the defendants to the petition filed before the Commission "or such of them as are or may be engaged in the transportation of property from New York and other North Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville in the State of Tennessee" . . . . "to cease and desist from charging or receiving any greater compensation in the aggregate for the trans-

portation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. pp. 56, 57.

The Commission made no order and gave no directions with regard to charging a greater compensation in the aggregate for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Memphis.

The Report and Opinion of the Commission will be found in Trans. p. 37, et seq.

XXI.

Proceedings in the Circuit Court.

The defendants to the petition filed before the Commission, (i. e., the appellants) conceiving that the order made by the Commission was not lawful, declined to obey the same; whereupon the Interstate Commerce Commission filed a petition against them in the Circuit Court of the United States for the Eastern District of Tennessee to enforce said order against them.

Said defendants answered said petition denying the matters of equity alleged by them; and all further proceedings were by consent of parties allowed to remain in abeyance to await the decision of the Supreme Court in what is known as the "Social Circle Case," reported under the style of C. N. O. & T. P. Ry. Co. et al. vs. I. C. C., 162 U. S., 195 et seq.

The parties not being able to agree as to the effect of the decision of the Supreme Court in the "Social Circle Case," the proceedings in this case were allowed to remain in further abeyance to await the decision of the Supreme Court in the case of the Interstate Commerce Commission vs. Alabama Midland Railway Co. et al.

168 U. S., 144 et seq.

The result was that the testimony in the Circuit Court was not taken in this case until the summer of 1897. The case came

on for hearing in the Circuit Court upon petition, answers and proof on December 13 and 14, 1897, before the Hon. Henry F. Severens; who, on February 2, 1898, rendered a decree against the defendants affirming the order of the Commission.

Trans. p. 381.

From said decree, said defendants (the appellants) prayed and obtained an appeal to the U. S. Circuit Court of Appeals on February 2d, 1898.

Trans. pp. 389, 390.

XXII.

Proceedings in the Circuit Court of Appeals.

The case was heard in the Circuit Court of Appeals on June 1 and 2, 1898.

Trans. pp. 392, 393.

On November 13, 1899, the Circuit Court of Appeals rendered a decree affirming the decree of the Circuit Court.

Trans. p. 393.

The appellants prayed and obtained an appeal to this Court on November 22, 1899.

Trans. p. 400.

XXIII.

Assignment of Errors.

The appellants, the East Tennessee, Virginia & Georgia Railway Company; the Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern

Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company, say that in the above mentioned decree, rendered by said United States Circuit Court of Appeals for the Sixth Circuit, on the 13th day of November, 1899, and in the record and proceedings in said Court, in this cause, there is manifest error in this, to wit:

I.

That said Circuit Court of Appeals erred in affirming the decree rendered in the above entitled cause, on the 2d day of February, 1898, by the Circuit Court of the United States for the Eastern district of Tennessee, with costs.

II.

That the said Circuit Court of Appeals erred in not reversing the decree rendered in the above entitled cause on the 2d day of February, 1898, by the Circuit Court of the United States for the Eastern District of Tennessee.

III.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the petition or bill, filed in the above entitled cause, in said Circuit Court of the United States for the Eastern District of Tennessee, by the appellee as complainant against the above-named appellants, as defendants, are fully denied in the answers and are not sustained by the proof, and that such petition or bill be dismissed with costs.

IV.

That said Circuit Court of Appeals erred because it, in effect, adjudged and decreed that the order made by the Interstate Commerce Commission, on the 30th day of December, A. D., 1892, in the case of the Board of Trade of Chattanooga vs. the East Tennessee, Virginia & Georgia Railway Company et al. is a

lawful order, and should be enforced; whereas, said order is unlawful and void, and should not be enforced.

V.

That said Circuit Court of Appeals erred in decreeing that the above-named appellants pay the costs.

VI.

That said Circuit Court of Appeals erred in decreeing, in effect, that the above named appellants, or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga, or through Chattanooga to Nashville, in the State of Tennessee, be required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line, in the same direction, to Nashville.

VII.

That said Circuit Court of Appeals erred in not deciding that the rates charged by the above-named appellants for the transportation of property from New York, Boston, Philadelphia, Baltimore, and other Atlantic seaboard cities, to Chattanooga, are just and reasonable.

VIII.

That said Circuit Court of Appeals erred in not deciding that the transportation of property, by the above-named appellants, from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Chattanooga, Tennessee, is not a like and contemporaneous service, and is not done under substantially similar circumstances and conditions, with the transportation of

property by the above-named appellants from New York, Boston Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee.

IX.

That said Circuit Court of Appeals erred in not deciding that the above-named appellants in making a greater charge in the aggregate for the transportation of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Chattanooga, Tennessee, than they make on such property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee, do not thereby give to Nashville, Tennessee, or its traffic an undue or unreasonable preference or advantage, and do not subject Chattanooga, Tennessee, or its traffic to an undue or unreasonable prejudice or disadvantage.

X.

That said Circuit Court of Appeals erred, because it, in effect, decided that the transportation by the above named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic Seaboard cities to Chattanooga, Tennessee, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee.

XI.

That said Circuit Court of Appeals erred because it, in effect, decided that the appellee, the Interstate Commerce Commission, has the power to fix the rates of transportation to be charged by the above-named appellants for property carried by them from

New York, Boston, Philadelphia, Baltimore or other Atlantic Seaboard cities to Chattanooga, Tennessee, and to Nashville, Tennessee, respectively.

Wherefore the above named appellants (the East Tennessee, Virginia & Georgia Railway Company; the Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company), pray that said decree of said United States Circuit Court of Appeals for the Sixth Circuit, rendered in the above entitled cause on the 13th day of November, 1899, be reversed, and that said court be ordered to enter a decree reversing the said decree rendered on the 2nd day of February, 1898, in the above entitled cause, by the said Circuit Court of the United States for the Eastern District of Tennessee, and ordering said petition or bill filed by said Interstate Commerce Commission in said Circuit Court to be dismissed with costs.

ED BAXTER,

Of Counsel for the above named Appellants.

XXIV.

ARGUMENT.

THE ORDER MADE BY THE COMMISSION IN THIS CASE WAS BASED EXCLUSIVELY UPON THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE.

The Commission did not base the order made by it in this case either upon the first section, which relates to the reasonableness of rates; nor upon the second section, which relates to unjust discrimination in rates; nor upon the third section, which

relates to unjust prejudice in rates. The Commission based said order upon the fourth section alone; it being the section which relates to charging more for a short than for a long haul.

The material part of the order is as follows:

That the appellants "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic Seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. pp. 56, 57.

The words "charging or receiving any greater compensation in the aggregate for the transportation of like kind of property for the shorter distance than for the longer distance over the same line, in the same direction" are taken literally from the fourth section of the Act to Regulate Commerce; and they are not to be found in any other section of the Act.

The contest before the Commission was regarded by both parties as a contest falling exclusively under the fourth section. Neither of the parties regarded it as a contest involving the question as to what are just and reasonable rates to Chattanooga under the first section; nor as to whether the rates unjustly discriminate against Chattanooga under the second section; nor as to whether the rates subject Chattanooga to an undue prejudice or disadvantage under the third section.

Neither of the parties conducted the case before the Commission upon the idea that the Commission would undertake to fix, or even suggest, what would be reasonable rates to Chattanooga; nor to decide what reduction in the present rates to Chattanooga would remove the discrimination against that city; nor to decide what reduction in those rates would relieve Chattanooga from

undue prejudice or disadvantage. The testimony before the Commission, and the Report and Opinion of the Commission itself, proceeded upon the theory that the proper construction of the *fourth* section was the *only* question submitted to the Commission.

That I am right in this contention is manifest from the following language used by the Commission:

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. *We refrain from further statement of the reasons which have induced this conclusion*, AS THE AMOUNT TO WHICH THE CHATTANOOGA RATE SHOULD BE REDUCED WILL NOT NOW BE DECIDED." . . . .

Trans. p. 54.

"In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirements of the statute (i. e., the long and short haul clause) should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. The question (i. e., as to what the relative rates to Chattanooga as compared with the rates to Nashville should be) which may arise, if permission (from the Commission) is sought to depart from the general rule relating to long and short hauls, was not specially discussed. On this ground, also, IT WOULD SEEM SUITABLE TO ALLOW OPPORTUNITY FOR A FURTHER HEARING BEFORE FIXING MAXIMUM RATES ON SHIPMENTS TO CHATTANOOGA."

Trans. p. 55.

"These lines (i. e., the appellants), are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the

large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT (I. E., CHATTANOOGA) MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

The Commission found and reported that "it seems improbable that the discrimination complained of can be made less oppressive *by any increase in the Nashville rate.*"

Trans. p. 54.

In other words, the competitive circumstances and conditions at Nashville are such that the Nashville rate cannot be increased.

The decree of the Circuit Court, affirmed by the Court of Appeals, orders that the Chattanooga rate shall not be higher than the Nashville rate.

Trans. p. 381.

As competitive circumstances and conditions render it impossible to increase the Nashville rate; the decree of the Circuit Court, in effect, orders that the Chattanooga rate be reduced to the Nashville rate; and this is so, notwithstanding the fact that the Commission reported that "the allowance of the same rate to the shorter distance point (i. e., Chattanooga), *might reduce their* (i. e., the appellants') *revenues below the limits of fair compensation.*"

Trans. pp. 53, 54.

As the Commission determined to dispose of the case upon the fourth section alone, it distinctly announced that "the amount to which the Chattanooga rate should be reduced will not now be decided."

Trans. p. 54.

And that a further hearing should be had "*before fixing maximum rates on shipments to Chattanooga.*"

Trans. p. 55.

As it is impossible to increase the Nashville rate, the Circuit Court, in decreeing that the Chattanooga rate shall not exceed the Nashville rate, fixes the latter as the maximum rate for Chattanooga, notwithstanding the Commission said that a further hearing should be had before fixing maximum rates for Chattanooga.

XXV.

The Commission Found as a Fact That Effective Rail Competition Exists at Nashville.

While the Commission found, as a fact, that there is no *water* competition from *Cincinnati* to Nashville, it also found, as a fact, that *rail* competition *does* exist at Nashville; and that it is of controlling force and effect upon the rates which the appellant railroads operating through Chattanooga must accept upon such traffic as they carry from eastern cities to Nashville.

The Commission says:

"3. There are a number of routes by which traffic from the Eastern Seaboard is carried to Nashville. These may be separated into two classes or groups; one consisting of the lines passing through Chattanooga, the other of the lines passing through Cincinnati, Louisville, Evansville, and possibly other points north of Chattanooga. How the aggregate through business to Nashville is divided between these different routes was not very definitely shown, but it is fairly inferable from the evidence that *the lines through Chattanooga carry fifty to sixty per cent. of the total tonnage.*"

Trans. p. 42.

Again the Commission says:

"There may be other routes or lines by which traffic from the Atlantic Seaboard reaches Nashville, Memphis or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. *The rates to each of these towns are the same by whatever route the transportation is effected*, except the rate to Memphis via New Orleans."

Trans. p. 45.

Again the Commission says:

"The Nashville rate *is independent of the lines operating through Chattanooga and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines, and the Louisville & Nashville system, whose northern termini are at points on the Ohio River, which receive Trunk Line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc.*, ALL OF WHICH ARE INTERSTATE CARRIERS SUBJECT TO THE ACT TO REGULATE COMMERCE. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the line through Chattanooga engaged in the Nashville business. *The acceptance of the rates so fixed by the rail line via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

Again the Commission says:

"In the findings of fact above set forth we have stated that the rates accepted for carrying eastern traffic to Nashville through Chattanooga are not influenced by *water* competition at the terminal point, but that the sole competition for Nashville business

from the Atlantic Seaboard *comes from the all-rail lines reaching the same destination by way of Cincinnati.*"

Trans. p. 52.

Again the Commission says:

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that *the defendant lines through Chattanooga have no voice or influence in determining its amount.* THESE LINES ARE UNDER COMPULSION, THEREFORE, TO MEET THE RATE WHICH OTHER CARRIERS HAVE ESTABLISHED, OR LEAVE THOSE CARRIERS IN UNDISTURBED POSSESSION OF THE ENTIRE TRAFFIC. THEY HAVE NO ALTERNATIVE BUT TO ACCEPT THE MEASURE OF COMPENSATION DICTATED BY INDEPENDENT RIVALS, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classification by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the Trunk Line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, BECAUSE THE LOWER RATE TO NASHVILLE IS BEYOND THEIR CONTROL, AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

The foregoing quotations from the Report and Opinion of the Commission show conclusively that there is actual *rail* "competion at Nashville."

They show that the rates from the eastern cities to Nashville are the same, whether the traffic be carried by the appellant rail lines operating through Chattanooga, or by the rival rail lines operating through Cincinnati.

They show that competition not only actually exists, but

that it exists with reference to traffic important in amount; because the Commission finds that the "lines through Chattanooga carry fifty to sixty per cent. of the total tonnage."

They show not only that competition exists at Nashville, and that it exists in regard to traffic important in amount; but they also show that the competition is absolutely controlling in its effect. The Commission finds in so many words, that "THE NASHVILLE RATE IS INDEPENDENT OF THE LINES OPERATING THROUGH CHATTANOOGA, AND THOSE LINES HAVE NO VOICE IN DETERMINING ITS AMOUNT."

Trans. p. 49.

"The Commission also finds that the Nashville rate is made by all-rail carriers via Cincinnati, and that "their action is uncontrolled by the defendant lines."

Trans. p. 49.

The Commission also finds that THE ACCEPTANCE OF THE RATES SO FIXED BY THE RAIL LINES VIA CINCINNATI WAS THE NECESSARY CONDITION UPON WHICH THE APPELLANT LINES VIA CHATTANOOGA COULD COMPETE FOR NASHVILLE TRAFFIC."

Trans. p. 49.

The Commission also finds that the appellant lines are "UNDER COMPULSION" to meet the rates which rival carriers have established, "OR LEAVE THOSE CARRIERS IN UNDISTURBED POSSESSION OF THE ENTIRE TRAFFIC."

Trans. p. 53.

The Commission also finds that the appellant lines "have no alternative but to accept the measure of compensation dictated by independent rivals, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE."

Trans. p. 53.

XXVI.

The Commission Erroneously Held that the Appellants Had no right to Consider the Competition at Nashville; Because the Competing Carriers Were All Subject to the Act to Regulate Commerce.

The Commission in its Report and Opinion says:

"In other words, the real competitors of the defendants for this transportation are the all-rail carriers reaching Nashville by way of Cincinnati, AND THOSE CARRIERS ARE CONFESSEDLY AMENABLE TO THE ACT TO REGULATE COMMERCE. If these views are correct, they control, prima facie at least, the determination of this case, for the primary question involved has been recently decided by the Commission."

Trans. p. 52.

"In a series of proceedings instituted by the Georgia Railroad Commission we have taken occasion to review with much care the fourth section of the statute, familiarly known as 'the long and short haul clause,' and have given it a construction intended to have general application."

"*Ga. R. R. Com. vs. Clyde Steamship Company et al.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324."

"The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the Report of the Commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

'The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or

through competition for the same traffic with carriers NOT SUBJECT TO REGULATION UNDER THE ACT TO REGULATE COMMERCE. IN OTHER cases under the fourth section, the circumstances and conditions are not presumptively dissimilar and *carriers must not charge less for the longer distance* EXCEPT UPON THE ORDER OF THIS COMMISSION.'

"This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of these defendants for the Nashville traffic in question ARE THEMSELVES INTERSTATE CARRIERS BY RAIL, AND SUBJECT, IN ALL RESPECTS, TO THE ACT TO REGULATE COMMERCE. It follows, therefore, that the carriers herein complained of which engage in the transportation of freight from the Eastern Seaboard to Nashville *through Chattanooga*, and publish and accept rates therefor which are lower than the rates maintained by them for like transportation to Chattanooga—a shorter haul included in the longer haul to Nashville—are acting in plain violation of the fourth section, and that the resulting discrimination against Chattanooga must be adjudged unlawful.

"Upon the facts ascertained in this case, and the interpretation of the statute to which we adhere, any other conclusion would be quite inconsistent. The construction placed upon the long and short haul clause in the Georgia cases was deliberately adopted, and its controlling application to the present controversy is not open to serious question. We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

Trans. pp. 52, 53.

The Commission was quite right in saying that upon the facts as ascertained by it in this case, and upon the interpretation of the statute to which it adhered, any other conclusion would have been "quite inconsistent."

The Commission was also quite right in stating that the construction which it placed upon the long and short haul clause in

the Georgia cases, and which construction it applied to this case, was "deliberately adopted."

And if that construction had been correct, the Commission would also have been quite right in saying that "its controlling application to the present controversy is not open to serious question;" provided, the facts as found by the Commission were correct.

The first opinion delivered by the Commission upon this subject was *in re* Southern Railway & Steamship Association (sometimes cited as *in re* Louisville & Nashville R. R. Co.) 1 Interstate Commerce Rep., pp. 278–291, in which it was held by the Commission, speaking through Judge Cooley, "that the existence of actual competition, which is of controlling force in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

1. When the competition is with carriers by *water*, which are not subject to the provisions of the statute;

2. When the competition is with *foreign or other railroads* which are *not subject to the provisions of the statute;*

3. In *rare and peculiar cases* of competition between railroads *which are subject to the statute*, when a strict application of the general rule of the statute would be destructive of legitimate competition."

See 1 Interstate Commerce Rep., p. 291, left col.

The case just referred to was decided June 15, 1887, a few months after the Act to Regulate Commerce was passed.

The rule as laid down in that case was adhered to by the Commission so long as Judge Cooley remained a member of it. But on November 1, 1892, the personnel of the Commission having changed, it overruled so much of Judge Cooley's decision as held that carriers were permitted to judge for themselves in the first instance as to what constitutes "rare and

peculiar cases of competition between railroads *which are subject to the statute*, when a strict application of the general rule of the statute would be destructive of legitimate competition." And the Commission, speaking through Mr. Commissioner Veazey, held that "the competition of carriers *subject to the Act to Regulate Commerce*, does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines."

See L. N. Trammell et al. vs. Clyde S. S. Co. et al. (sometimes cited as the Georgia R. R. Commission vs. Clyde S. S. Co. et al.) 4 Interstate Commerce Rep., p. 121, Head Note No. 6.

The rule as laid down by the Commission in the case last referred to was adhered to by it ever afterward, until the decision by this Court in the case of the Interstate Commerce Commission vs. Alabama Midland Ry. Co. et al. The case of Ga. R. R. Com. vs. Clyde Steamship Co. et al. was cited and relied upon by the Commission as absolutely "*controlling*" in the present controversy.

Trans. p. 52.

In the case of Brewer & Hanleiter vs. L. & N. R. R. Co. et al., 7 Interstate Commerce Rep., p. 237, decided June 29, 1897, the Commission cite said case of Ga. R. R. Com. vs. Clyde S. S. Co. et al., and reaffirm it, as holding "that competition between railroads *subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute.*"

In other words, the Commission, from the time said case of Ga. R. R. Com. vs. Clyde S.S. Co. was decided, until the Alabama Midland Railway case was decided by this Court, uniformly, consistently, and persistently, held "that competition between railroads *subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute :*" even though the competition may be actual; of controlling force; and in respect to traffic important in amount. The Commission de-

liberately enforced that doctrine, in this case, in its strictest literality, and to the fullest extent.

It was with reference to that very doctrine that this court in said case of the Interstate Commerce Commission vs. Alabama Midland Railway Co. used the following language:

"It is further contended on behalf of the appellant that the court below erred in holding, in effect, that competition of carrier with carrier, *both subject to the Act to Regulate Commerce*, will justify a departure from the rule of the fourth section of the Act, without authority from the Interstate Commerce Commission, under the proviso to that section."

168 U. S., p. 167.

"In view of the conclusion hereinbefore reached, the proposition comes to this: That when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the Commission." . . .

168 U. S., p. 167.

"We are unable to suppose that Congress intended by the fourth section and the proviso thereto to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them to do so." . . .

168 U. S., p. 169.

"Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether upon the evidence in the present case the courts below erred in dismissing the Interstate Commerce Commission's complaint."

168 U. S., p. 170.

See also L. & N. R. R. vs. Behlmer, decided by this court at the present term.

The error of the Commission in this case cannot be more clearly or forcibly stated than by a simple contrast between the doctrine held by the Commission and the doctrine held by this Court.

The doctrine held by the Commission as stated in Brewer & Hanleiter vs. L. & N. R. R. Co., et al., referred to above, and which is one of the recent decisions of the Commission upon the subject, is "that competition between *railroads subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute.*"

7 Interstate Commerce Rep., p. 237.

The doctrine held by this Court, as announced in the Alabama Midland Railway case, is that competition between railroads, *though they be subject to the Act, may make out a case of dissimilar circumstances and conditions within the meaning of the statute, if the competition be such as "affects rates."*

168 U. S., p. 144, et seq.

L. & N. R. R. Co., vs. Behlmer, MS. Op., Oct. Term, 1899.

If this Court is right, the Commission's decision in this case is erroneous; and its order, so far as the fourth section is concerned, is unlawful.

The Commission, in its Eleventh Annual Report, in commenting upon the decision of this Court in the Alabama Midland case, says:

"The defendants (i. e., in the Alabama Midland case) insisted that the fact of *railway competition* at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The Commission had held in many previous cases, and held in this case (i. e., the Alabama Midland case), that *railway competition between carriers subject to the provisions of the Act* could not of itself create the necessary dissimilarity in circumstances and conditions. This contention is not sustained by the Supreme Court, which holds that such competition does

create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

The italics are mine.

11 Ann. Rep., I. C. C. (1897), p. 38.

Again, the Commission says:

"That section (i. e., the fourth) enacts that the carrier shall not charge more for the short than for the long haul under substantially similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The Court holds (i. e., in the Alabama Midland case) that *railway competition* of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter. We have no power to say whether, nor to what extent, such competition justifies the higher rate to the intermediate point."

11 Ann. Rep. I. C. C. (1897), p. 43.

Again, the Commission says:

"On November 8, 1897, the Supreme Court held, in the case entitled Interstate Commerce Commission vs. Alabama Midland Ry. et al. (the Troy case, 168 U. S., ——) that *railroad competition* may create discriminating (dissimilar?) circumstances and conditions under the fourth section and thereby justify greater charges for the shorter haul."

11 Ann. Rep., I. C. C. (1897), p. 91.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al., decided December 31, 1897, the Commission, in speaking of the defense relied upon in certain instances in that case, says:

"In all other instances the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and con-

ditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however, the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission vs. Alabama M. R. Co.*, decided November 8, 1897, 168 U. S., 144, 42 L. Ed. ——, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al.

It will be seen that the Commission expressly concedes that the doctrine announced by it to the effect that the competition of carriers *subject to the Act to Regulate Commerce* does not create circumstances and conditions which the carriers can take into account, has been overruled by this Court in the Alabama Midland Railway case.

XXVII.

Judge Severens' Error in Holding That the Fourth Section of the Act to Regulate Commerce May Apply, Notwithstanding There May be a Substantial Dissimilarity of Conditions.

In the case at bar, Judge Severens, referring to the decision of the Commission in said case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al., says that the Commission, "evidently disheartened by the adverse ruling of the Supreme Court in recent cases," . . . "seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

Trans. p. 378.

The Judge, after referring to the language quoted by me in the last preceding section of this argument from the decision of the Commission in that case, says:

"Now, I do not understand that such a conclusion follows from that decision (i. e. the decision of the Supreme Court in the Alabama Midland case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* . . . In other words, my opinion is that the restraint of *section* 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates*, and that it is competent *under that section* to restrain the exaction of the greater charge for the shorter haul, *although there may be a substantial dissimilarity of conditions*, provided the dissimilarity is not so great as to justify the discrimination made."

Trans. p. 379.

I respectfully submit that there is manifest error in Judge Severens' construction of the fourth section. It is a construction

which has never been given to that section by any other court; nor by the Commission in any of its decisions. The material part of section 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

In Re Southern Ry. & S. S. Association (sometimes cited as *In Re* L. & N. R. R. Co.) 1 I. C. Rep., p. 280, Judge Cooley, in speaking of the effect of the introduction into the fourth section of the phrase "under substantially similar circumstances and conditions," said:

"Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the Act does not declare unlawful must remain lawful if it were so before; and that which it fails to forbid, the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden ONLY WHEN BOTH ARE UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS; and if, therefore, in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, SINCE IF THE CIRCUMSTANCES AND CONDITIONS OF THE TWO HAULS ARE DISSIMILAR THE STATUTE IS NOT VIOLATED"

The language of Judge Cooley was quoted approvingly by Judge Ross, in the case of I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., pp. 300-301; and see Behlmer vs. L. & N. R. R. Co., 71 Fed. Rep., p. 839; Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep. No. 2, p. 261; I. C. C. vs. Alabama Midland Ry. Co., and 168 U. S., p. 168.

Judge Severens is right in saying that the Commission "seems to give up section 4 as of no force or effect in any case *where the*

conditions are not substantially similar;" but he is mistaken in supposing that the Commission's yielding of its position was due to the Commission being "disheartened by the adverse ruling of the Supreme Court in recent cases." It will be seen that *In Re* Southern Ry. & S. S. Association referred to above, and which was one of the very first cases decided by the Commission, the Commission, speaking through Judge Cooley, gave "up section 4 as of no force or effect in any case *where the conditions are not substantially similar*."

His language in that case was that "if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

The construction of the fourth section, suggested for the first time by Judge Severens, would, if sound, require an amendment of the fourth section such as is indicated by capitals in the following paragraph:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; AND EVEN WHERE THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, SUCH DISSIMILARITY MUST BE IN DUE PROPORTION TO THE EXISTING DISPARITY IN RATES."

His Honor's construction is:

"That the restraint of *section four* is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates;" (Trans. p. 379) and it is impossible to put that construction upon the fourth section, unless, by judicial legislation, the Court adds to the language of that section some such provision as is indicated by capitals in the preceding paragraph.

In the recent case of the United States vs. Trans-Missouri Freight Association, this Court refused to read into the Anti-

Trust Act an exception or provision which altered the natural meaning of the language used, and that too upon a material point.

166 U. S. 329.

The construction which Judge Severens proposes to put upon the fourth section is new, but it is not useful; because, if the disparity in rates between the shorter and longer distance points be such as to constitute an undue preference in favor of the latter, or an undue prejudice against the former, relief can be given under the third section of the Act. If, however, the disparity does not constitute any undue preference in favor of the longer distance point, nor any undue prejudice against the shorter distance point, it does no harm to anyone; and it ought not to be prohibited, as it is proposed to do, by the judicial amendment suggested by Judge Severens.

The Commission, in its Eleventh Annual Report, commenting upon the decision of the Supreme Court in the Alabama Midland case upon the fourth section, says:

"If the circumstances and conditions are similar, the greater charge cannot be made. IF THE CIRCUMSTANCES AND CONDITIONS ARE NOT SIMILAR, THE SECTION DOES NOT APPLY. The Court holds that railway competition of controlling force makes the circumstances dissimilar. IF, THEREFORE, WE FIND, IN A PARTICULAR CASE, THAT COMPETITION OF CONTROLLING FORCE ACTUALLY EXISTS, THAT ENDS THE MATTER. WE HAVE NO POWER TO SAY WHETHER, NOR TO WHAT EXTENT, SUCH COMPETITION JUSTIFIES THE HIGHER RATE TO THE INTERMEDIATE POINT."

"THE THIRD SECTION IS STILL LEFT, AND UNDER THAT SECTION WE MAY INQUIRE WHETHER, UNDER ALL THE CIRCUMSTANCES, THE RATES AS ADJUSTED GIVE AN UNDUE PREFERENCE TO THE COMPETITIVE POINT, but the fourth section is, by this decision, eliminated from the Act."

11 Ann. Rep., I. C. C. (1897), p. 43.

The Commission is wholly mistaken in supposing that the fourth section is eliminated from the Act by the decision of this Court in the Alabama Midland Ry. case. If the circumstances and

conditions are substantially similar, then under the fourth section the carrier is prohibited from charging more for the short than the long haul, *whether the disparity in rates does or does not give an undue preference to the longer distance point.* If, however, the circumstances and conditions are substantially dissimilar, while the fourth section can have no operation, the third section remains operative, and under that section the Court can decide whether the disparity in rates constitutes an undue preference in favor of the longer distance point, or an undue prejudice against the shorter distance point.

In the case of the Savannah Bureau of Freight & Transportation vs. the Charleston & Savannah Ry. Co., the Commission, again commenting upon the decision of the Supreme Court in the Alabama Midland case, upon the fourth section, says:

"The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' IF THE CONDITIONS AND CIRCUMSTANCES ARE NOT SUBSTANTIALLY SIMILAR, THEN THE SECTION (i. e. THE FOURTH) DOES NOT APPLY, and the carrier is not bound to regard it in the making of its tariff. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate to the intermediate point, and the higher rate is not prohibited by the *fourth* section." . .

"WHETHER THOSE RATES ARE IN VIOLATION OF THE THIRD SECTION, IN THAT THEY GIVE AN UNDUE PREFERENCE TO THE MORE DISTANT POINT, IS A DIFFERENT QUESTION, WHICH MIGHT ARISE IN CASES OF THIS KIND."

7 I. C. Rep. pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al.

In all cases where a greater charge is made for a shorter than for a longer haul, the whole question can, according to Judge Severens, be settled under the fourth section; and the third section, under his construction, is, in such cases, of no value whatever.

But, according to the construction which the Commission puts upon the decision of this Court in the Alabama Midland case, and which construction, *in that respect*, is, I think, the correct one, IF THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, THE FOURTH SECTION DOES NOT APPPLY; BUT THE THIRD SECTION REMAINS, AND UNDER THAT SECTION IT MAY BE DETERMINED WHETHER THE DISPARITY IN RATES CONSTITUTES AN UNDUE PREFERENCE OF THE LONGER DISTANCE POINT.

Judge Severens is mistaken in supposing that the Commission is "disheartened by defeat;" or that its comments upon the decision of this Court are the mere exclamations of a panic-stricken fugitive. On the contrary, the Commission, with a clear conception of what this Court has decided in reference to the fourth section, has fallen back upon the third and first sections of the Act, and the opinion of the Commission in the recent case of Calloway vs. L. & N. R. R. Co. et al., 7 I. C. Rep., p. 431, unmistakably indicates that the Commission intends to use the third and first sections in the future, in all cases of a greater charge for a shorter distance, where the circumstances and conditions are substantially dissimilar; and where, for that reason, the fourth section has no application.

It may be argued by counsel for appellee that Judge Severens' construction of the fourth section finds some support in the following language used by this Court in the Alabama Midland Ry. case:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the question of 'undue or unreasonable preference or advantage,' or 'what are substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such

cases, there is no absolute rule which prevents the Commission or the Courts from taking that matter into consideration."

168 U. S., p. 167.

Surely nothing can be found in the language just quoted to sustain Judge Severens in his proposition, that *though the circumstances and conditions may be substantially dissimilar, the "restraint of section four is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."*

This Court, in saying that "we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections," did not intend to intimate that either section contains any such restraint as that the rates must be "upon the scale of comparison between the dissimilarity of conditions and the disparity of rates." The only restraint contained in the fourth section is that the carrier shall not charge more for a shorter than for a longer haul under substantially similar circumstances and conditions; and this Court, in saying that the mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraint of the fourth section, means that competition which is fictitious, or ineffective, or in which the public has no interest, shall not be taken into consideration at all, as a circumstance or condition affecting transportation. If, however, the competition be genuine and effective, and if it subserves the public interest as well as that of the carrier, it may be taken into consideration; and in such a case, it will relieve the carrier from the restraint of the fourth section, i. e., from charging more for a shorter than for a longer haul. But the restraint of the third section remains, and if the disparity in rates constitutes an *undue* preference of the longer distance point, the rates may be declared unlawful under the restraint of that section, notwithstanding they may not offend against the restraint of the fourth section at all.

Judge Severens seems to doubt the soundness of his own construction of the fourth section, and to concede that it may become necessary to fall back upon the third section. His language is:

"But the long and short haul clause is only one of the specific provisions employed for the general purpose of the Act. The third section underlies the fourth and supplies the principles on which it rests; so that if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

Trans. p. 379.

The only error in the language just quoted consists in the proposition that "the third section underlies the fourth and supplies the principles on which it rests."

Trans. p. 452.

The third section does *not* underlie the fourth. The third section covers ground which is entirely distinct from that which is covered by the fourth section. The *third* section does not prohibit *any* preference *unless it is undue or unreasonable*; while the *fourth* section prohibits a greater charge for the shorter than for the longer distance, if the circumstances and conditions be substantially similar, *whether such disparity of rates does, or does not, constitute an undue or unreasonable preference of the longer distance point.*

XXVIII.

Judge Severens' Error in Supposing That This Court Held That the Rigor of the Fourth Section Can be Moderated.

In the case at bar, Judge Severens uses this language:

"Conceding that some allowance should be made for the conditions at Nashville, the rigor of the rule of the long and short haul clause of the fourth section, moderated to some extent, *as it was held might be done in the case of the Commission vs. The Alabama Midland Railway Company*, 168 U. S., 144, the disproportion in the present case is too gross."

The italics are mine.

Trans. p. 373.

I respectfully deny that it was held, or even intimated, by

this Court in the Alabama Midland Ry. case, that "the rigor of the rule of the long and short haul clause of the fourth section" could be "moderated to some extent," or to any extent.

The case was decided upon the ground that the long and short haul clause of the fourth section *did not apply at all*; and not upon the ground that "the rigor" of that clause had been properly, or improperly, "moderated." If the circumstances and conditions are substantially similar, and a greater charge is made for a shorter than for a longer distance, etc., no court has the power to "moderate" the rigor of the fourth section to the slightest extent. If, in such a case, the charge to the shorter distance point exceeds the charge to the longer distance point, even to the extent of a mill, such charge is absolutely prohibited by the fourth section; and no power is vested in any court to moderate the rigor of the prohibition.

The carrier, upon application to the Commission, may, in special cases, be relieved from the operation of the fourth section; but as no application has been made to the Commission for relief in the case at bar, it is unnecessary to discuss the question whether the Commission would, upon such an application, have the power to moderate the rigor of the fourth section;—or, whether it would be limited to granting or refusing full absolution. But whatever power the Commission might have under a special application for relief, it is certain that in a case where no application for relief has been made to the Commission, no Court has the right to moderate, to any extent whatever, the rigor of the long and short haul clause in any case to which it applies.

XXIX.

Judge Severens' Error as to What was Held by the Lower Courts in the Alabama Midland Railway Case.

In the case at bar Judge Severens, in commenting upon the decision of this Court in the Alabama Midland Ry. case, uses this language:

"*Both the courts below had concurred in holding that the Commission was wrong in thinking the disparity of charges was too great in view of the facts*, and the Supreme Court did not find sufficient reason for reversing their decree."

The italics are mine.

Trans. p. 374.

I respectfully deny that either the Circuit Court, or the Court of Appeals, decided the Alabama Midland case upon the ground that the Commission was wrong "*in thinking the disparity of charges was too great.*" Neither of those courts intimated that "the restraint of section four is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."

That "scale of comparison" was invented, for the first time, by Judge Severens; and neither the Circuit Court, nor the Court of Appeals, attempted to use it in the Alabama Midland Railway case. Both of those courts decided that case on the ground that the circumstances and conditions were substantially dissimilar, and, therefore, *that the fourth section did not apply at all.* And neither of them attempted to discuss the question as to whether the rigor of that section had been properly, or improperly, "moderated" by the Commission.

See the Opinion of the Circuit Court in the Alabama Midland Ry. case, 69 Fed. Rep., 227 to 233; and the Opinion of the Circuit Court of Appeals in 74 Fed. Rep., 715 to 733.

XXX.

Judge Severens' Error in Supposing that this Court Held that Competition is not to be Regarded as a Controlling Consideration.

In the case at bar, Judge Severens said:

"The Supreme Court in that case (i. e., the Alabama Midland Ry. case), while reaffirming the doctrine that competition

between railway carriers might, and frequently ought, to be considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it (competition) should be regarded as a *controlling* consideration."

Trans. p. 374.

I respectfully deny that this Court "took pains to prevent the inference that competition should be regarded as a *controlling* consideration." On the contrary, I insist that the very point decided by this Court in the Alabama Midland Ry. case was that where competition *is such that it can be properly considered* it *is* to be allowed to *control* in the making of rates.

I will hereinafter show that the competition at Nashville, the longer distance point, is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore that it can be properly considered. And I will hereinafter show that if the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates at competitive points.

There can be no middle course. The Courts must hold either that competition *can* be considered, or that it *cannot* be considered, in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court in the Alabama Midland Ry. case, that competition, such as affects rates and such as subserves the interests of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

XXXI.

Judge Severens' Error in Holding that Congress Intended that there Must be Something Unusual and Peculiar in the Competition.

In the case at bar, Judge Severens said:

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity; for otherwise, the vast bulk of transportation would not be subject to the rule at all."

Trans. p. 374.

The inference which counsel for appellee may seek to draw from the language just quoted is, that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

If counsel's construction of his Honor's language is correct, his Honor has fallen into the very error for which the Commission was reversed in the Alabama Midland Ry. case.

In the opinion delivered by the Commission in the Alabama Midland Ry. case, it was said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. Re Louisville & Nashville R. R. Co., 1 Inters. Com. Rep., 278, 1 I. C. C. Rep., p. 31."

4 Inters. Com. Rep., p. 35, left col. Board of Trade vs. Alabama Midland R. Co.

It will be noticed that the Commission, in deciding the question of rail competition in the Alabama Midland Ry. case, based its opinion upon its previous decision In Re Louisville & Nashville R. R. Co.

In Re Louisville & Nashville R. R. Co. (sometimes cited as Re Southern Railway & Steamship Association), 1 Inters. Com. Rep. p. 278, it was held by the Commission that where railroads are subject to the Act to Regulate Commerce, competepetition between them could not be considered except in "*rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare," or "peculiar," or "unusual" in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce, could be taken into consideration. It had also decided that competition, even between rail carriers subject to the Act, could be taken into consideration "*in rare and peculiar cases.*".

1 Inters. Com. Rep., p. 278, right col., 5th head note.
In Re Southern Ry. & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was whether competition between rail carriers subject to the Act could be considered, *where there was nothing "rare," "unusual," or "peculiar" in it; and where it was in no wise different from other ordinary rail competition.* I understand this Court to have decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

See also L. & N. R. R. Co., et. al. v. Behlmer, MS. Op. Oct. Term., 1899.

XXXII.

The Contention That Competition Cannot be Considered Except in Extreme Cases.

Counsel for appellee may refer to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he may argue that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases.

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

XXXIII.

How the Order Made by the Commission in This Case May be Complied With.

The order of the Commission will be found in Trans. pp. 56, 57. The appellants, or such of them as are, or may be engaged in the transportation of property from New York and other Atlantic Seaboard points to Chattanooga, or through Chattanooga to Nashville, in the State of Tennessee, are severally required to "cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga, than for the longer distance over the same line in the same direction to Nashville.

Trans. p. 57.

If said order should be enforced by the Court as made by the Commission, it is manifest that the appellants might (if they could) comply with it in either one of several ways.

First: They might, if competition at Nashville would permit, increase the rates to Nashville, to the extent of a certain portion of the difference between the present rates to Nashville, and the present rates to Chattanooga; and then reduce the rates to Chattanooga to the extent of the remainder of said difference; or

Second: They might, if competition at Nashville would permit, increase the rates to Nashville, to the full extent of the difference between the present rates to Nashville, and the present rates to Chattanooga; or

Third: They might reduce the rates to Chattanooga to the full extent of the difference between the present rates to Nashville and the present rates to Chattanooga.

If the appellants could effectively carry out either one of

those three plans, they would comply not only fully, but fairly, with the order "as made" by the Commission.

Both the first and the second of said plans would necessitate a *material* increase in the rates to Nashville, or they would be useless.

An increase in the Nashville rates to the extent of—say one-half the difference between the present rates to Nashvilie, and the present rates to Chattanooga, would amount to the following figures, in cents per hundred pounds, viz.:

Classes	1	2	3	4	5	6
	11½	10	13	15½	12	9

Trans. p. 42.

An increase in the Nashville rates to the full extent of the difference between the present rates to Nashville, and the present rates to Chattanooga, would amount to the following figures, in cents per hundred pounds:

Classes	1	2	3	4	5	6
	23	20	26	31	24	18

Trans. p. 42.

It must be remembered that the appellants are railroad companies *whose lines cannot reach Nashville, except through Chattanooga.*

It must also be remembered that the *appellants do not make the rates from the eastern cities to Nashville*; those rates being made by the Trunk Lines from eastern cities to Ohio River points, operating in connection with the Louisville & Nashville Railroad Company, whose lines extend from the Ohio River to Nashville, *but which is not a party to this proceeding, so far as its lines from the Ohio River to Nashville are concerned.*

Upon this point the Commission says:

"Practically, therefore, the Nashville rate, by the several routes now under consideration, is an extension of the Trunk Line rate to that point, the total charge being divided between

the several carriers in nearly exact proportion to the mileage operated by each."

Trans. p. 43.

Again the Commission says:

"The general range of rates in the territory covered by the Southern Railway & Steamship Association (i. e., the territory south of the Potomac and Ohio Rivers and east of the Mississippi River), is materially higher than in the territory of the Trunk Line Association (i. e., the territory north of the Ohio River, between Chicago and New York), the difference resulting mainly *from the much greater volume of traffic in the latter section*;" etc.

Trans. p. 48.

Again the Commission says:

"The Nashville rate is independent of the lines operating through Chattanooga, *and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati*, and their action is uncontrolled by the defendant lines."

Trans. p. 49.

As the Nashville rate "is made by the all-rail carriers via Cincinnati," the only way in which the appellants can secure an effective increase in the Nashville rate is to induce "the all-rail carriers via Cincinnati" to agree to such increase.

The rates from New York to Nashville are divided between the Trunk line roads north of the Ohio River and the Louisville & Nashville Railroad south of that river. The division is as follows:

Classes	1	2	3	4	5	6
The proportions received by the Trunk Lines for transportation from New York to Cincinnati are the following, in cents per hundred pounds,	65	57	44	30	26	22

Trans. p. 42.

The proportions received by the L. & N. R. R. for transportation from Cincinnati to Nashville are, in cents per hundred pounds.....	26	21	16	12	10	9

Trans. p. 43.

Making total rates from New York via Cincinnati to Nashville.....	91	78	60	42	36	31

Trans. p. 42.

If the appellants should ask the Trunk Lines to agree to materially increase the above proportions which they receive out of the Nashville rate for transportation from New York to Cincinnati, the trunk lines would be forced to decline. Because the Trunk Line rates from New York to Cincinnati, as well as the Trunk Line rates from New York to Louisville, Evansville, St. Louis, Columbus, Indianapolis and all other important junctional points in Trunk Line territory, are constructed so as to give each of those points the same proportion of the rates which prevail between New York and Chicago, as the distance of each of those points from New York bears to the distance from Chicago to New York.

See Wholesale Prices, Wages and Transportation, Senate Rep. No. 1394, 2d Sess., 52 Con., Part I, pp. 429, 430.

The Trunk Lines would therefore say to the appellants "we cannot increase our proportions of the Nashville rate received for transportation by us from New York to Cincinnati, *unless we make the same increase in our rates on all traffic shipped from New York destined to stop at Cincinnati; nor unless we also increase, in the same proportion our rates from New York to Louisville, Evansville, St. Louis, Columbus, Indianapolis and all other important junctional points in Trunk Line territory.* Considering the great volume of traffic in Trunk Line territory, it is believed that the Trunk Line rates are already as high as they can be reasonably made; and if we should attempt to increase the Trunk Line rates from New York to Cincinnati, Louisville, Evansville, St. Louis, Columbus, Indianapolis, and all other important junctional

points in Trunk Line territory, innumerable complaints would be made to the Interstate Commerce Commission against us; and the probabilities are that such complaints would be sustained. For these reasons, we must decline to advance the Trunk Line rates from New York to Cincinnati."

The appellants might then apply to the Louisville & Nashville Railroad Company, and ask that company to increase the proportions which it received out of the Nashville rate for transportation from Cincinnati to Nashville; but that company also would be forced to decline. Because the rates from New York to Nashville are now materially higher than are the rates from New York to Cincinnati, Louisville, or Evansville.

Trans. pp. 51, 52.

The Louisville & Nashville Railroad Company would therefore say to the appellants "we cannot increase our proportions of the Nashville rates received for transportation by us from Cincinnati to Nashville, without increasing materially the disparity which already exists as against Nashville in favor of Cincinnati, Louisville and Evansville, in through rates from New York. If we should increase the present disparity, it would prevent Nashville from competing with either Cincinnati, Louisville, or Evansville, in the territory lying between Nashville and the Ohio River; it would prevent Nashville from competing with Memphis in the territory lying between Nashville and the Mississippi River; and it would divert a large amount of traffic from our line to steamboats plying between Evansville and Nashville. For these reasons, we must decline to advance the proportions received by the L. & N. R. R. Co. out of the rates from New York to Nashville."

It is manifest from the foregoing considerations, that it would be utterly impossible for the appellants to induce either the Trunk Line roads or the L. & N. Railroad to agree to any material increase in the rates from New York, via Cincinnati, to Nashville.

It may be said, however, that though the appellants may not be able to induce the Trunk Line roads, or the Louisville & Nashville Railroad, to agree to increase the rates from New York, via Cincinnati, to Nashville, there is nothing to prevent the appellants from increasing their own rates from New York, via Chattanooga, to Nashville, to the extent of one-half, or even to the full extent, of the difference between the present rates to Nashville, and the present rates to Chattanooga.

We have above shown what such increases would amount to in cents per hundred pounds, on the different classes; and it is obvious that if the appellants should charge rates from New York, via Chattanooga, to Nashville, which are that much higher than the rates now charged from New York, via Cincinnati, to Nashville, the appellants could not obtain the carriage of a single pound of traffic from New York, via Chattanooga, to Nashville.

Upon this point the Commission says:

"*The acceptance of the rates so fixed by the rail lines via Cincinnati* was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

Again the Commission says:

"THESE LINES (i. e., the appellant lines) ARE UNDER COMPULSION, THEREFORE, TO MEET THE RATES WHICH OTHER CARRIERS HAVE ESTABLISHED, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE."

Trans. p. 53.

In other words, unless the appellants can induce the Trunk Line roads and the Louisville & Nashville Railroad to make an increase in their rates, which those roads do not think they would

be justified in making, the appellants must abandon to those roads the large percentage of Nashville business which the appellants now secure.

It is obvious, therefore, that as both the first and second plans suggested above involve an increase in the rates to Nashville, which it is impossible to secure, the appellants are in effect compelled to adopt the third plan, i. e., *to reduce the rates from New York to Chattanooga to the full extent of the difference between the present rates to Nashville and the present rates to Chattanooga.* In other words, instead of the appellants really having an option to adopt either of the three plans mentioned above, they are, *for all practical purposes*, forced to confine themselves to the third plan, or abandon all participation in the Nashville traffic. The entire loss which is to be sustained in making the Chattanooga rates not higher than the Nashville rates is to fall exclusively upon the appellants, whose lines reach Nashville through Chattanooga; and no part of the loss is to fall upon the rival carriers, whose lines reach Nashville through Cincinnati. And this is so, notwithstanding those rival lines are the very lines which are really responsible for the disparity which exists between the present rates to Nashville, and the present rates to Chattanooga. Upon this point the Commission says:

"For these conditions the carriers complained of do not appear *chiefly* responsible, because the lower rate to Nashville is beyond their control."

Trans. p. 53.

The Commission could have said, with equal truth, that the carriers "complained of" are not responsible *at all* for the lower rate to Nashville.

We are thus confronted with the singular proposition, that a court, authorized by the act "to form a *just* judgment," ought to enforce an order of the Commission for a readjustment of rates between two competing cities (i. e., Nashville and Chattanooga), *by punishing the innocent, and allowing the guilty to go scot free.*

For, if either set of lines is guilty of any wrong in creating a disparity between the rates to Chattanooga and the rates to Nashville, those lines operating via Cincinnati are alone guilty.

XXXIV.

The Order Made by the Commission in this Case is Not Lawful Under the Third Section of the Act.

Though the Commission may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section (which I deny), the Court has power to enforce it.

Though the circumstances and conditions at Nashville may be substantially dissimilar from those at Chattanooga, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an *undue* preference of Nashville, the rates may be declared to be unlawful. But before a violation of the third section can be established, it must be shown that the disparity of rates as between Nashville and Chattanooga, however considerable it may be, constitutes not only a preference, but an *undue* preference in favor of the longer distance point.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway & Canal Traffic Act of 1854, and upon Section 11 of the English Railway & Canal Traffic Act of 1873. For the convenience of the Court I print in parallel columns so much of said sections as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.
English Act.

SEC. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.

SEC. 11. Railway and Canal Traffic Act, 1873.—1 *Nev. & Mac., p.* 11.

. . . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever. —1 *Nev. & Mac., pp.* 2-11.

UNDUE PREFERENCE CLAUSE.
American Act.

SEC. 3. Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 U. S. *Stat. at Large, p.* 380.

XXXV.

ONLY SUCH DISCRIMINATIONS OR PREFERENCES AS ARE UNJUST OR UNREASONABLE ARE PROHIBITED BY THE ACT.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust and unreasonable.*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R. R.

In the case of I. C. C. vs. Ala. Midland R'y. Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*

69 Fed Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha vs. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue.* The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination is *undue or unjust?*

DIAGRAM NO. 5.

In the above diagram, No. 5, suppose A–C to represent a railroad owned by one company, and A–B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A–C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity

of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference, or prejudice or discrimination is not *undue* or *unjust*. Merchants at B would have no ground of complaint against the line A–C; because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any ground of complaint against the line A–B, because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A–B, but by the line A–C, over which the line A–B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from A to C would not of itself establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might compel the company to accept on traffic from A to C rates much lower than it otherwise might reasonably charge.

XXXVI.

Neither the Preference in Favor of Nashville and Memphis, nor the Prejudice or Discrimination Against Chattanooga, is Unjust or Unreasonable.

The Commission finds and reports that the Nashville rate "is made by the all-rail carriers via Cincinnati;" and that "their action is uncontrolled by the defendant lines," which reach Nashville, through Chattanooga.

Trans. p. 49.

The Commission finds and reports that "the Nashville rate is independent of the lines operating through Chattanooga;" and that those lines "have no voice in determining its amount."

Trans. p. 49.

On the other hand, the Commission finds and reports that the Chattanooga rates, both "rail and water," and "all-rail," are "established by the Southern Railway & Steamship Association;" which was an association entirely distinct from the Trunk Line Association, which makes the rates from New York and other North Atlantic ports to Cincinnati and other Ohio River points.

Trans. p. 48.

We therefore have one of the cases illustrated by Diagram No. 5, in Section XXXV. of this argument. The *real* complaint of Chattanooga is not that the rates charged by the appellant lines to that city are too high, in and of themselves; but that they are too high as compared with rates which the Trunk Lines, in connection with the Louisville & Nashville Railroad, charge to Nashville, and to Memphis, respectively. Neither the Trunk Lines, nor the Louisville & Nashville Railroad, reach Chattanooga; and, therefore, Chattanooga merchants have no right to complain against those lines, because of the low rates which they see proper to charge to points which they do reach.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry., et al., 4th head note.

The Commission finds and reports that the Nashville rate "is an extension of the Trunk Line rate to that point, the total charge being divided between the several carriers in nearly exact proportion to the mileage operated by each."

Trans. p. 43.

The Commission also finds and reports "that the Memphis through rate, like the Nashville through rate, is, in effect, an extension of the Trunk Line rate to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage."

Trans. p. 44.

The Commission also finds and reports "that the general range of rates in the territory covered by the Southern Railway

& Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly *from the much greater volume of traffic in the latter section.*"

Trans. p. 48.

The preference which exists in favor of Nashville and Memphis is due alone to the fact that the general range of rates in the territory of the Trunk Line Association is materially lower than the general range of rates in the territory of the Southern Railway & Steamship Association.

The Commission finds and reports that the distance from New York, via Bristol and Chattanooga, to Nashville, is 1052 miles (Trans. p. 46); and that the distance from New York, via Cincinnati, to Nashville, is also 1052 miles.

Trans. p. 45.

As the distance from New York to Nashville, via the Bristol and Chattanooga route, is precisely the same as the distance from New York to Nashville, via the Cincinnati route, it is manifest that if the general range of rates in the territory of the Trunk Line Association were the same as the general range of rates in the territory of the Southern Railway & Steamship Association, Nashville would get the same rates from New York whether the shipments came via Cincinnati, or via Bristol and Chattanooga. And it is also manifest that Chattanooga would, in that case, get lower rates than Nashville from New York; because the distance from New York to Chattanooga is 151 miles less than the distance from New York to Nashville.

The Commission finds and reports that the Trunk Line rate per ton per mile (on first-class freight) is $1\frac{7}{10}$ cents (Trans. p. 43); whereas the Southern Railway & Steamship Association rate per ton per mile (on first-class freight) is $2\frac{4}{10}$ cents.

(NOTE.—The rate on first-class freight from New York to Chattanooga, a distance of 901 miles (Trans. p. 46), is $1.14 per hundred pounds (Trans. p. 42); which is equivalent to, say $2\frac{4}{10}$ cents per ton per mile.)

It will be seen, therefore, that the Trunk Line rate is to the Southern rate as $1\frac{7}{10}$ is to $2\frac{7}{10}$; or, for all practical purposes, it is as 2 is to 3. As the Trunk Line rate is so much less per ton per mile than the Southern rate, it is easy to see why it is that the total rate from New York to Nashville, or to Memphis, may be less than the total rate from New York to Chattanooga; notwithstanding Nashville and Memphis may be more distant than Chattanooga from New York.

Great stress is placed upon the fact, as found and reported by the Commission, to the effect that, in many instances "under the tariffs now in force, goods may be carried from the East through Chattanooga to Nashville, and back through Chattanooga to points South and East, and there sold at lower prices than Chattanooga merchants can sell for.

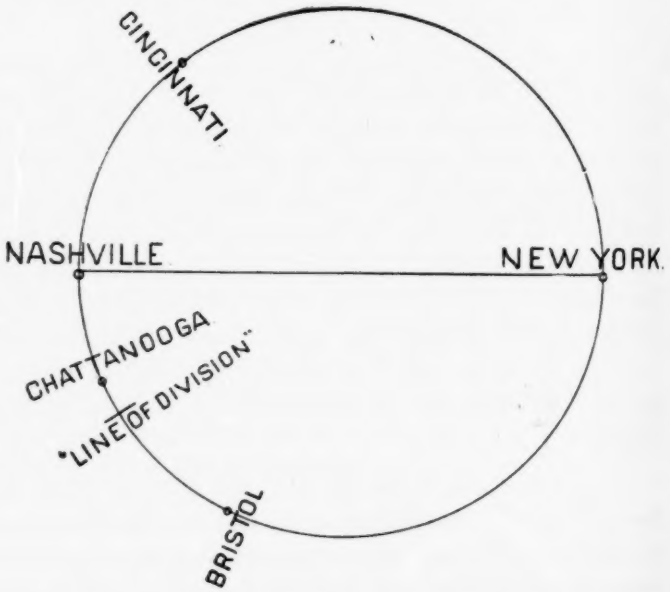
Trans. p. 47.

The fact is due alone to the difference between the Trunk Line rates and the Southern rates. The Trunk Line rates per ton per mile from New York, via Cincinnati to Nashville, are such that in a few instances (though not in many as reported by the Commission), shipments of certain articles may be made from New York, via Cincinnati, to Nashville, at such rates, as that the shippers can afford to pay the local rates of the Nashville, Chattanooga & St. Louis Railway from Nashville to Chattanooga, and to a few points south and east of Chattanooga and their total rates will be somewhat less than the Southern rates per ton per mile make the total rates from New York direct to Chattanooga.

As such rates can be obtained from New York via the Trunk Lines to Nashville, on shipments made via Cincinnati, the appellant lines operating through Chattanooga meet the Trunk Line rates to Nashville; and, therefore, in a few instances, shipments may be made from New York *through Chattanooga* to Nashville, and back to Chattanooga at less total rates than are charged from New York to Chattanooga direct. *But the reason why such shipments can be made is precisely the same when they pass through*

Chattanooga, as when they pass through Cincinnati; viz., *that the Trunk Line rates are less per ton per mile than the Southern rates.*

As stated above, the distance from New York, via Cincinnati, to Nashville, is exactly the same as the distance from New York, via Bristol and Chattanooga, to Nashville, viz., 1,052 miles. If, therefore, we draw a circle 2,104 miles in circumference, with New York and Nashville as points on the circumference, and draw a straight line from New York to Nashville, said line will divide said circle into halves. We have drawn such a circle on a scale of $5\frac{5}{16}$ miles to the degree, and by that scale we have located Cincinnati, Nashville, Bristol and Chattanooga, according to their respective distances from New York. Said circle is shown on Diagram No. 6:



The distances from New York to Cincinnati, Nashville, Bristol and Chattanooga, respectively, are as found and reported by the Commission.

Trans. pp. 45, 46.

If a New York merchant, B, should ship a ton of first-class freight over the northern half of said circle, via Cincinnati, he would, upon payment of $21.46, as freight, be entitled to 1,255 miles of transportation; and the terminus of said 1,255 miles is indicated on the circumference of said circle by the point marked "Line of Division." It will be noticed that his shipment would pass from New York through Cincinnati; through Nashville; through Chattanooga; and to a point 52 miles south of Chattanooga.

On the other hand, if a New York merchant, C, should ship a ton of first-class freight over the southern half of said circle, via Bristol, he would, upon the payment of $21.46, as freight, be entitled to only 849 miles of transportation; and the terminus of said 849 miles is indicated on the circumference of said circle by the same point that is marked "Line of Division." In other words, C's shipment would not reach Chattanooga at all. On the contrary, it would meet B's shipment at said point marked "Line of Division," which is 52 miles south of Chattanooga. The only reason why B would be entitled to 1,255 miles of transportation, as against the 849 miles to which C would be entitled, is, that the Trunk Line rates are less per ton per mile than the Southern rates. We can readily see from said diagram why it is that shipments may be made from New York to Nashville, and thence to Chattanooga, and even to said point marked "Line of Division," which is 52 miles south of Chattanooga, for less money than is charged by the Southern lines from New York direct to Chattanooga. We can also appreciate the statement made by the Commission that "it is inevitable that difficulties should exist and complaints arise *along the line of division* between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

XXXVII.

Southern Rates Must, of Necessity, Be Higher per Ton per Mile than Trunk Line Rates.

The Commission finds and reports that the difference between the general range of Southern rates and the general range of Trunk Line rates results mainly "from the much greater volume of traffic" in the Trunk Line territory.

Trans. p. 48.

Mr. Knox testifies that the difference between the Southern rates and Trunk Line rates "is due to the enormously greater volume of business, and the very much larger population" in the Trunk Line territory than in the Southeastern territory; and that if the Southeastern roads were to undertake to make their rates the same per ton per mile as the roads north of the Ohio, including the Trunk Lines, none of the Southern roads, with their limited volume of tonnage and population, could make expenses."

Trans. pp. 210, 211.

The Interstate Commerce Commission, for statistical purposes, has divided the United States into ten territorial groups. The Trunk Line territory (i. e., the territory between Chicago and New York) comprises groups II. and III.; and the Southern territory (i. e., West Virginia, Virginia, North Carolina, South Carolina, Kentucky, Tennessee, Mississippi, Alabama, Georgia and Florida) comprises groups IV. and V., as designated by the Commission.

See Statistics of Railways (1894) Frontispiece.

The Statistician of the Commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

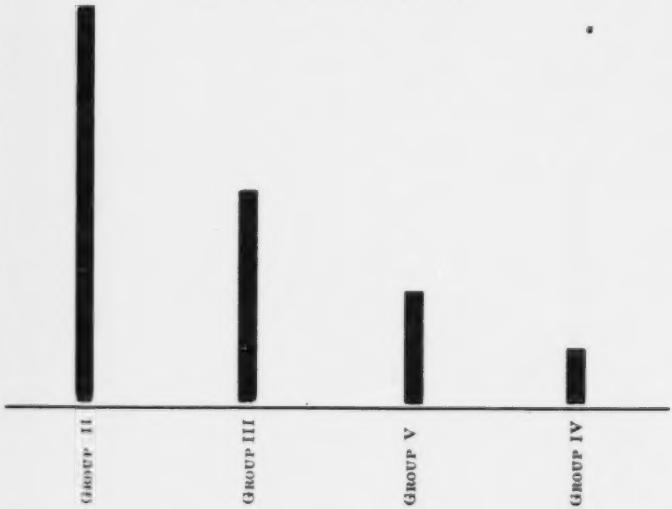
The following diagram (F) illustrates the difference between

the railroads in groups II., III., IV. and V. in their "earnings from freight service" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 4.

DIAGRAM F.

"EARNINGS FROM FREIGHT SERVICE."



The following diagram (G) illustrates the difference between said railroads in their "earnings from passenger service" during the year 1894.

Statistics of Railways (1894.) Appendix Diagram No. 4.

DIAGRAM G.

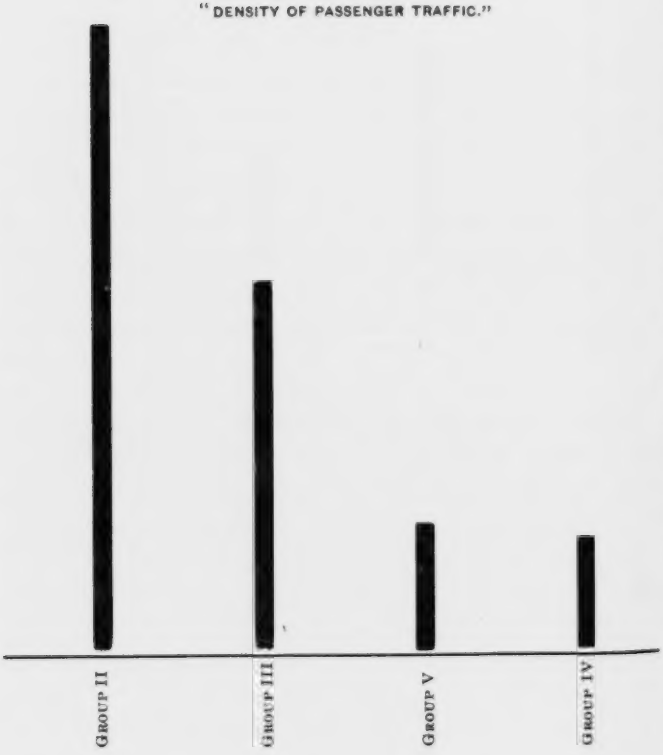
"EARNINGS FROM PASSENGER SERVICE."

The following diagram (H) illustrates the difference between said railroads in "the density of passenger traffic" during the year 1894.

Statistics of Railways (1894.) Appendix Diagram No. 6.

DIAGRAM H.

"DENSITY OF PASSENGER TRAFFIC."

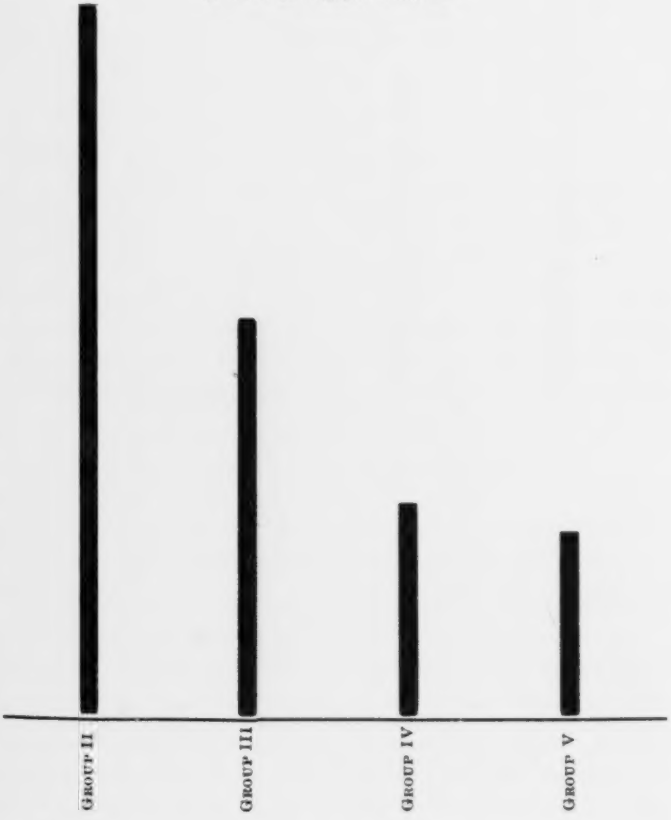


The following diagram (I) illustrates the difference between said railroads in "the density of freight traffic" during the year 1894.

Statistics of Railways 1894. Appendix Diagram No. 7.

DIAGRAM I.

"DENSITY OF FREIGHT TRAFFIC."

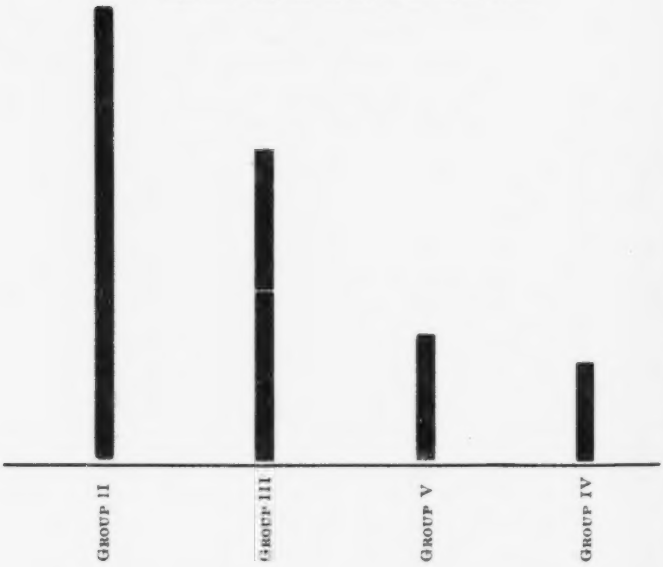


The following diagram (J) illustrates the difference between said railroads in the proportion of capital stock upon which dividends were paid during the year 1894:

Statistics of Railways (1894). Appendix Diagram No. 2.

DIAGRAM J.

"CAPITAL UPON WHICH DIVIDENDS WERE PAID."



When we compare the railroads in the Trunk Line territory with those in the Southern territory, whether we look to their "earnings from freight service;" or to their "earnings from passenger service;" or to their "density of passenger traffic;" or to their "density of freight traffic;" or to the proportion of their "capital stock upon which dividends were paid during the year 1894;" a mere glance at said diagram is sufficient to show that it is impossible for the Southern railroads to operate under Trunk Line rates. In fact, it is difficult to see how the Southern railroads can be operated, as they are, under rates which are only one-third higher per ton per mile, than the Trunk Line rates.

XXXVIII.

The Competition which Exists at Nashville is Entitled to the Same Consideration Under the Third Section as it is Under the Fourth Section of the Act to Regulate Commerce.

In the case of the Texas & Pacific Ry. vs. I. C. C., 162 U. S., p. 232, this Court quotes approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

"The English cases establish the rule that, *in passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, *the relative quantities or volume of the traffic involved*, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise."

162 U. S., p. 232, Tex. & Pac. Ry. vs. I. C. C.

In the same case, this Court, in discussing the *third* section, say:

"In passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions, that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage*, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to

be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not *undue and unjust*, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered," etc.

162 U. S., pp. 233, 234, Tex. & Pac. Ry. vs. I. C. C.

In the case just referred to, the "competitive routes" were either all water lines from Liverpool via Cape Horn to San Francisco, or water and rail lines from Liverpool via the Isthmus of Panama to San Francisco; or water and rail lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said "competitive routes" was "subject to the Act to Regulate Commerce;" and the Commission declined to recognize that case as deciding that competition between carriers which are "subject to the Act to Regulate Commerce" can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent case of the Interstate Commerce Commission vs. Alabama Midland Railway Co., 168 U. S., pp. 164-167. See, also, L. & N. R. R. vs. Behlmer, MS. Op. Oct. Term, 1899.

Though, as heretofore conceded, it is competent for the Court, in this case, to determine whether the disparity in rates between Nashville and Chattanooga constitutes an undue preference of Nashville within the purview of the third section, yet, under the cases just cited, I contend that the competition existing at Nashville is entitled to precisely the same consideration under the third section, as it is under the fourth section of the Act.

In the case of I. C. C. vs. C. N. O. & T. P. R'y Co. (known as the Social Circle case), Newman, J., said:

"*As to the question of undue preference, under section* 3 of the Act to Regulate Commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an *undue* preference in favor of Augusta (the longer distance point), or an *undue* prejudice or disadvantage against Social Circle (the shorter distance point). In the Party Rate case (Interstate Commission vs. Baltimore & O. R. Co., 145 U. S., 263, 12 Sup. Ct. Rep., 844), this Court say:

'But, so far as relates to the question of 'undue preference' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English Courts, and intended to incorporate them into the statute. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.'

"So that, unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the 'undue preference' provisions of the third section."

56 Fed. Rep., 947, 948.

XXXIX.

THE MERE FACT OF COMPETITION DOES NOT RELIEVE A CARRIER; BUT COMPETITION THAT AFFECTS RATES AND SUBSERVES THE PUBLIC INTEREST MAY DO SO.

Counsel for the appellee referred in argument, in the court below, to the following language used by this Court in the Alabama Midland Railway case, viz.:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do

not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167.

I do not contend "that the *mere* fact of competition, no matter what its character or extent," necessarily "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that affects rates* should be considered." And that proposition has been distinctly decided by this court both in the case of the Texas & Pac. Ry. vs. I. C. C., 162 U. S., 233; and in the case of I. C. C, vs. Alabama Midland Ry. Co., 168 U. S., p. 166.

See also L. & N. R. R. vs Behlmer, MS. Op. Oct. term 1899.

In the case at bar, the Commission finds and reports that the rail competition at Nashville does "*affect the rates*" which the appellant carriers accept on traffic from New York to Nashville. The language of the Commission is:

"These lines *are under compulsion, therefore, to meet the rate which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure.*"

Trans. p. 53.

Counsel for the appellee also quoted in argument, in the court below, the following language from the opinion of this court in the Alabama Midland Railway case, viz.:

"The competition may in some cases be such as, *having due regard to the interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition in Nashville "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this court in 168 U. S., pp. 165-166, and in 162 U. S. pp. 233-234, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "places of shipment" include Boston, New York, Philadelphia, Baltimore, and other Eastern cities. The communities occupying the localities where the goods "are delivered" include the communities at Chattanooga and at Nashville.

The welfare of New York and other Eastern cities, and the welfare of Nashville are to be considered, as well as the welfare of Chattanooga. New York and other Eastern cities are entitled to the advantage which accrues to them from the competition afforded by the Trunk Lines and the Louisville & Nashville Railroad from New York, via Cincinnati, to Nashville; and they are also entitled to the advantage of the competition afforded by the appellant lines from New York, via Chattanooga, to Nashville. Nashville is also entitled to the benefit of the competition which exists between the route, via Cincinnati, and the appellants' route via Chattanooga. Nashville is as much entitled to the advantage of the fact that she can avail herself of the competition which exists between those rival routes, as Chattanooga is entitled to avail herself of the advantage of the fact that she is somewhat nearer than Nashville to New York and other Eastern cities; a fact which, though true when measuring by the appellants' route via Chattanooga, is not true when measuring by the Trunk Line route via Cincinnati.

Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), Q. B., 329, et seq.

The Phipps case was cited approvingly by this Court in 162 U. S., 224, T. & P. Ry. vs. I. C. C.; and 168 U. S., p. 164, I. C. C. vs. Alabama Midland Ry. Co. et al.

I also contend that the competition at Nashville "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellant carriers. The Commission found as a fact that "there is a conceded margin of profit in the rates now in force to Nashville" . . . . "*with reference to the additional expense incurred in carrying Eastern traffic to that point.*"

Trans. p. 63.

It is to the fair interests of the appellants to be allowed to earn that "margin of profit," however small it may be. It is by making small "margins of profits," on large volumes of low rate traffic, shipped over long distances, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellants sustain no loss in the carriage of traffic to Nashville; and therefore they are under no temptation to increase the rates to Chattanooga, or to any other point, to recoup against loss. In other words, to paraphrase the language of this court, "having due regard to the interests of the public, as well as of the appellant carriers, the competition at Nashville ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellant carriers to take that competition into consideration, notwithstanding it was competition between carriers "*confessedly amenable to the Act to regulate Commerce.*"

XL.

The mere Fact that there is a Material Disparity Between the Rates to Nashville and Chattanooga Does Not, of Itself, Constitute an Undue Preference, or an Unjust Discrimination.

In the case of the Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 219, 220, this court says:

"The mere circumstance that there is, in a given case, a pref-

erence or an advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the same case, on page 239, the Court say:

"The mere fact that the disparity between the through and the local rates was considerable, did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation vs. The Charleston & Savannah Ry. Co., 7 I. C. Rep., p. 480, the Commission having decided that certain shorter distance rates involved in that case were not in violation of the *fourth* section, says:

"Whether those rates are in violation of the *third* section, in that they give an undue preference to the more distant point, is a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. There is nothing in the case which bears upon it except the mere fact that the rate to the intermediate point is higher. Under these circumstances we have not considered the question as fairly before us, and do not pass upon it in disposing of the case."

I have shown in this argument that, in the case at bar, the Commission based the order in controversy upon the *fourth* sec-

tion; that all other questions that might have been raised and decided were treated by the Commission as merely incidental. In that respect, the case at bar is analogous to the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., just referred to. In the case at bar, as in that case, there is nothing which bears upon the question of undue preference, "*except the mere fact that the rate to the intermediate point is higher.*"

Under the authority of the case of the Texas & Pacific Railway vs. I. C. C., as well as under the authority of the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., cited above, I contend that there is no sufficient evidence in this case to justify this Court in declaring that the mere disparity in rates between Nashville and Chattanooga constitutes an undue preference in favor of the former, or an undue prejudice against the latter.

In the case at bar, this Court is asked by counsel for the appellee to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Company, viz., to declare that the appellants have given undue preference to the longer distance point; when there is nothing in the case which bears upon that question, except the mere fact that the rates to the shorter distance point are higher. This Court is asked to do the very thing for which this Court reversed the Court of Appeals in the case of Texas & Pacific Railway vs. Interstate Commerce Commission, namely, to declare that the mere fact that the disparity between rates is considerable warrants the Court in finding that such disparity constitutes "an undue discrimination." It is certain that this Court has no more evidence before it in this case than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Company; or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. vs. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

XLI.

The "Scale of Comparison" Suggested by Judge Severens Cannot be Used in Practical Rate-Making.

In the case at bar, Judge Severens said:

"In other words, my opinion is that the restraint of *Section* 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates* and that it is competent under *that* section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

Trans. p. 379.

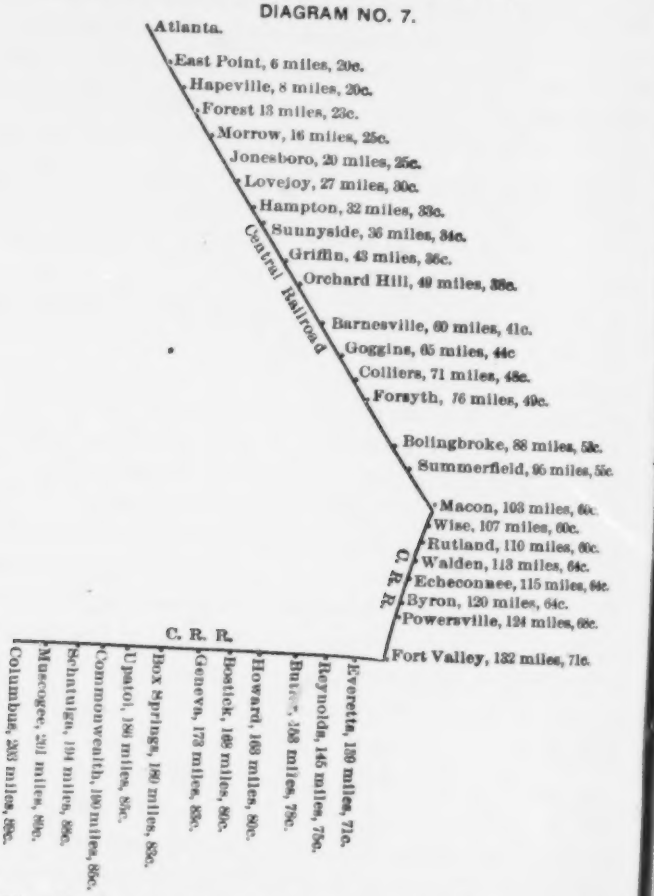
It is one thing to state a theoretical proposition, and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what he means by the phrase, "the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and I also submit that there is no practical railroad traffic manager who can make out a tariff or schedule of rates upon any such "scale of comparison" as Judge Severens suggests.

For the purpose of demonstrating my proposition that the "scale of comparison" suggested by Judge Severens cannot be used in practical rate-making, we will suppose that the following diagram, No. 7, represents the Central of Georgia Railroad, running from Atlanta, via Macon and Ft. Valley, to Columbus, Ga., a distance of 203 miles. As that portion of the line lies wholly within the State of Georgia, its maximum rates are fixed by the Railroad Commission of that State. Freight tariffs as fixed by the Georgia Railroad Commission are constructed upon a mileage

basis, i. e., the rates increase as the distance increases; though not in the same proportion. The diagram shows certain designated local stations with their respective distances from Atlanta, and the rates in cents per hundred pounds as fixed by the Georgia Railroad Commission for the transportation of first-class freight from Atlanta to said stations, respectively:

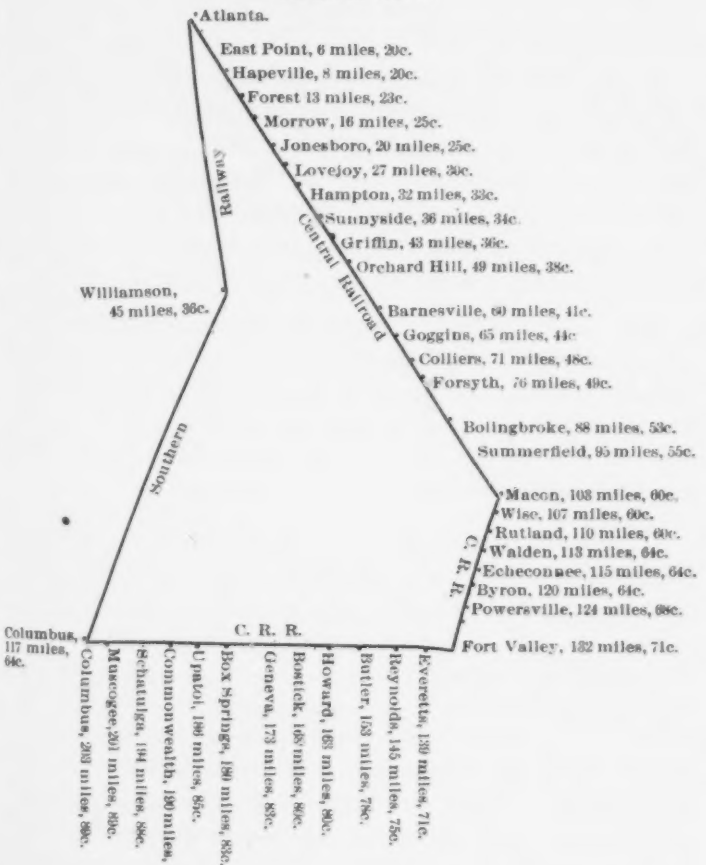
DIAGRAM NO. 7.



We will suppose that for a number of years the Central Railroad was the most direct route between Atlanta and Columbus; and the one usually employed in the transportation of freight between those cities. As the rates from Atlanta to all of said local stations were constructed upon a mileage basis, and as there

was no instance in which a greater charge was made for a shorter than for a longer distance, people living along the line were doubtless entirely satisfied with the rate adjustment. We will suppose, however, that within a recent period two railroads have been constructed, both of which have been acquired by the Southern Railway; and by using a portion of each of them, a new line between Atlanta and Columbus has been opened for business, which is only 117 miles long, as against 203 miles by the old line of the Central. The new line is shown on the following diagram, No. 8:

DIAGRAM NO. 8.



In the case supposed, under the mileage tariff, as fixed by the Georgia Railroad Commission, the Central was, and still is, entitled to charge 89 cents per hundred pounds, for the transportation of first-class freight, 203 miles from Atlanta to Columbus.

The Georgia Railroad Commission also fixed the tariff of freight rates for the Southern Railway over the new line; and said tariff was constructed upon the same mileage basis as the tariff of the Central Railroad. The distance from Atlanta to Columbus by the new line of the Southern Railway being only 117 miles, the rate on first-class freight from Atlanta to Columbus by that line, as fixed by said Commission, cannot exceed 64 cents per hundred pounds.

It is obvious that upon the completion of the new line, the traffic manager of the Central was confronted with the question whether he would continue to charge 89 cents per hundred pounds, as he had the right to do, for transporting freight 203 miles from Atlanta to Columbus; or ignore the difference in distance between his line and the new line, and accept 64 cents per hundred pounds; it being the rate fixed for his rival.

It is quite clear that he was compelled to accept the same rate as his rival, or abandon the competitive traffic altogether. No one would pay the Central 89 cents per hundred pounds, for transporting freight from Atlanta to Columbus, when for 64 cents per hundred pounds its transportation could be obtained over a new and shorter route, and in less time.

If the traffic manager of the Central Railroad of Georgia had concluded to abandon the competitive traffic to his rival, one effect would have been to deprive Atlanta and Columbus of the service of the Central Railroad, notwithstanding it had been for many years the only railroad serving those cities. Another effect would have been to deprive the stockholders and bondholders of the Central Railroad of all revenue theretofore realized by that railroad from the transportation of traffic between Atlanta and Columbus; unless the Georgia Railroad Commission had permitted the Central Railroad to increase its local rates so as to reimburse it for the loss sustained by being forced to abandon

the competitive traffic. If the traffic manager of the Central Railroad had ascertained that he could earn sufficient revenue, at the reduced rate, to pay something more than the additional cost of movement of the competitive traffic, he would naturally have determined to continue to carry freight from Atlanta to Columbus. It would still have been necessary for his trains to run from Atlanta in the direction of Columbus, in order to carry freight from Atlanta to the local stations on the Central Railroad; and the additional cost of carrying, in the same trains, a few cars of freight loaded at Atlanta, and destined to Columbus, would be comparatively small. If he could earn anything over such additional cost of movement, while it might not be sufficient to pay anything toward dividends, or even toward fixed charges, it would still be a profit *over what it would cost to move that particular freight;* and however small it might be, it would contribute something toward the operating expenses. At all events, it would not be any burden upon the other traffic.

We will suppose, therefore, that the traffic manager of the Central Railroad did conclude to continue carrying freight from Atlanta to Columbus; and that he was forced to accept 64 cents per hundred pounds for the service. *The question arises, how was he to apply the "scale of comparison" suggested by Judge Severens?* It will be seen from the diagrams above referred to in this section, that on the mileage basis upon which the tariff of the new line, as well as that of the old line, was constructed, Byron, a local station on the old line 120 miles from Atlanta, has the same rate as Columbus on the new line—i. e., 64 cents per hundred pounds. It will also be seen that the rates from Atlanta to all of the local stations on the old line, between Byron and Columbus, are higher than the rate from Atlanta to Columbus by the new line; because all of said local stations are more distant from Atlanta than Columbus is, by the new line.

If the traffic manager of the Central Railroad of Georgia did conclude to accept 64 cents per hundred pounds from Atlanta to Columbus, *how was he to readjust the rates from Atlanta to the local stations on his line between Byron and Columbus?* Was he to reduce the rates from Atlanta to all of those stations to 64 cents per hun-

dred pounds, so as to make them not higher than the rate to Columbus? If he was not to reduce them to the level of the Columbus rate, *to what extent was he to reduce them?* Take the rate from Atlanta to Butler, which was 78 cents. Was that rate to be reduced to 64 cents, or 65 cents, or 66 cents, or 67 cents, or 68 cents, or 69 cents, or 70 cents, or 71 cents, or 72 cents, or 73 cents, or 74 cents, or 75 cents, or 76 cents?

The "dissimilarity of conditions" created at Columbus by the opening of the new line necessitated a reduction from 89 cents to 64 cents per hundred pounds, in the rate from Atlanta to Columbus. Now, if there was to be *any* "disparity of rates" as between Columbus, and the local stations on the old line, from Byron to Columbus, *how was the amount of that "disparity" to be ascertained?* I repeat that there is no theoretical mathematician, or practical traffic manager, who can take the diagrams referred to above, *and mark opposite each of the local stations on the old line between Byron and Columbus the rate that ought to be fixed from Atlanta to that station, so that the rates will comply with Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates."* If the roads represented in said diagrams were interstate roads, the Interstate Commerce Commission, prior to the Alabama Midland Ry. decision, would have reduced all of the rates from Atlanta to the local stations between Byron and Columbus down to the level of the Columbus rate. In that case there would have been no "*disparity* of rates," and consequently no use for a "scale of comparison between the dissimilarity of conditions and the disparity of rates." But since the decision in the Alabama Midland Ry. case, the competition at Columbus would be recognized as constituting a substantial "dissimilarity of conditions;" and a "disparity of rates" would exist to the extent of the difference between the new rate from Atlanta to Columbus, and the old rates from Atlanta to the respective local stations on the old line between Byron and Columbus; and if Judge Severens' "scale of comparison" is of any value, *it ought to enable us to determine the precise amount of reduction that ought to be made in the rate to each of those stations.*

My contention is, that instead of attempting to use the theoretical and impracticable "scale of comparison" invented by Judge Severens, the Commission and the Court should determine from the testimony, First: Whether it would subserve the interest of the public as well as of the Central Railroad, for the latter to compete at Columbus, at the new rates offered by the new road; and second: Whether the rates charged to stations between Byron and Columbus would have been regarded as just and reasonable if the new road had not been constructed; and if these two facts be decided in the affirmative, "the extent of the discrimination" *will determine itself*, and will amount exactly to whatever the difference may happen to be between the reasonable rates charged to stations between Byron and Columbus, and the lower rates forced by the competition of the new road at Columbus, the longer distance point.

XLII.

Judge Severens' Error in Construing My Argument as Contending that the Extent of the Discrimination Must be Confided to the Judgment of Railroad Officials.

In the case at bar, Judge Severens said that the argument of counsel for the carriers was, in effect, that "the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task," and that "there is nothing for the Commission or the Court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry."

Trans. p. 377, 378.

His Honor misapprehended my argument. I have never claimed that the "extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission or the Court to review the judgment of railroad officials on any question.

My argument was, as it now is, that where the existence of

competition at a longer distance point is such as to create a substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at a shorter distance point, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens.

My contention was, and is, that the *extent* of the discrimination" *determines itself.* If the rates to the shorter distance point be reasonable within the purview of the first section, and competition forces lower rates to some longer distance point, there is but one question submitted either to the carrier, the Commission or the Court, and that is whether it will subserve the public interest, as well as the carrier's interest, for the carrier to compete at such longer distance point.

The decision of that question by the carrier may be reviewed either by the Commission, or the Court. But if the Commission or the Court agrees with the carrier that it will subserve the public interest, as well as the interests of the carrier, for the carrier to compete at the longer distance point, then "the extent of the discrimination" *will determine itself*; and it will amount to exactly the difference between the reasonable rates charged to the shorter distance point, and the lower rates forced by competition to be charged at the longer distance point; whatever that difference may happen to be.

XLIII.

The Limitations Which May Reasonably Be Imposed Upon Carriers in the Exercise of Their Rights to Take Into Consideration Competition, as One of the Circumstances and Conditions Affecting Transportation.

My contention concedes that carriers in exercising the right to take into consideration competition, as one of the circum-

stances and conditions affecting transportation, must act within "reasonable limits."

In the case at bar I suggest that the "reasonable limits" imposed upon the exercise of said rights are three; each of which is eminently practical, and capable of judicial determination.

First: The rates charged by the appellants to Chattanooga, the shorter distance point, must not be unjust or unreasonable, within the purview of the first section of the Act; i. e., they must be such as would have been regarded as just and reasonable if lower rates were not charged to Nashville, the longer distance point.

Second: The competition at Nashville must be such as subserves the public interest. It must also be real; and such as to compel the acceptance by the appellants of the rates that are accepted by them at that point.

Third: The rates accepted by the appellants on traffic to Nashville, the longer distance point, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

Within the above limits, any rates which may be accepted by the appellants upon traffic to Nashville, the longer distance point, are lawful.

The first limitation suggested by me concedes that the rates charged by the appellants to Chattanooga, the shorter distance point, must not be unjust or unreasonable; i. e., they must be such rates as would be regarded as perfectly fair, were it not for the fact that the appellants are accepting less rates to Nashville, the longer distance point.

If the rates charged by the appellants to Chattanooga, the shorter distance point, are not just and reasonable, they violate the first section of the Act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections.

But if the rates charged by the appellants to Chattanooga are just and reasonable (a question which I will consider hereinafter

under the first section of the Act), we have the case of a complaint made on behalf of certain persons at Chattanooga who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellants are accepting less rates to Nashville, a longer distance point.

As said by Lord Curriehill, in Hozier vs. the Caledonian Ry. Co., their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

1 Nev. & Mac., 32, Note 4; 1 Nev. & Mac., pp. 45–47, Jones vs. E. C. Ry. Co.; 2 Nev. & Mac., p. 202, Foreman et al. vs. Great Eastern Ry. Co.; 1 Nev. & Mac., pp. 97–108, Harris vs. Cockermouth, etc., Ry. 1 Nev.; & Mac., p. 120, Ransome vs. E. C. Ry. Co.

The Hozier case was cited by this Court in 145 U. S., p. 282; and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S. p. 283.

The Foreman case was cited by this Court in 162 U. S. p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates from New York and other Eastern cities to Chattanooga are just and reasonable, in and of themselves (the question which I will hereinafter consider under the first section), the appellants ought not to be required to reduce them, even though such reduction may be necessary to place Chattanooga upon a "rate equality" with Nashville; because such a reduction in rates to Chattanooga not only involves a serious reduction in the revenue which the appellants derive from the present rates on Eastern traffic *to Chattanooga; but it also involves a serious reduction in the revenue which they derive from the present rates on Eastern traffic to the twenty-four other cities, with which Chattanooga is grouped.*

It appears from the report of the Commission that Chattanooga is grouped with, and takes the same rail and water rates from New York and other Eastern cities on all classified traffic

as the twenty-four following cities located in the same territory, viz.: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Ft. Gaines, Griffin, Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, Eufaula, Enterprise, and Meridian.

Trans. p. 48.

If the rates from New York and other Eastern cities to Chattanooga should be reduced, without making the same reduction to the above-mentioned cities, with which Chattanooga is grouped, their trade would be unjustly diverted from them to Chattanooga; and if the same reduction should be made in the rates to those cities that would be made in the rates to Chattanooga, the loss of revenue to the appellants would be appalling. While the appellants have no right to subject Chattanooga to any *undue* prejudice or disadvantage, or to give Nashville any *undue* preference or advantage, yet, unless the advantage which Nashville has over Chattanooga in the matter of rates from New York and other Eastern cities *is* an *undue* advantage, the appellants are under no obligation, either legal, or moral, to submit to such an enormous loss of revenue, merely to force an equality of Eastern rates, as between Nashville and Chattanooga.

The second limitation suggested by me concedes that the competition at Nashville, the longer distance point, must be such as subserves the public interest; that it must be real, and not feigned or fraudulent; and that it must be effective; i. e., such as to compel the acceptance of the rates that are accepted by the appellants to that point.

If the competition at Nashville is simulated or fraudulent, then my proposition concedes that it does not fall within the "*reasonable limits*" of the privilege accorded to carriers of regarding competition as one of the bases on which to regulate their action in prescribing rates.

There is no pretense, however, that the competition at Nashville is either simulated or fraudulent. The language of the Commission is "The Nashville rate *is independent of the lines operating through Chattanooga, and those lines have no voice in deter-*

mining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines."

Trans. p. 49.

Again the Commission says:

"*These lines (i. e. the appellants') are under compulsion therefore to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure.*"

Trans. p. 53.

The third limitation suggested by me concedes that the rates accepted by the appellants on traffic to Nashville must yield some profit (though it be very small) *over the additional cost of the movement of that traffic.*

If the appellant lines are capriciously, wantonly or recklessly carrying Eastern traffic to Nashville at a loss, it is not only an undue preference of Nashville, and an undue prejudice against Chattanooga, but it is an injustice to the appellants' stockholders and creditors. But if the appellants are realizing *any* "margin of profit" *over the additional expense incurred in carrying the Eastern traffic to Nashville*, it is their duty to their stockholders and bondholders to earn such revenue as they may be able to realize from that traffic; and in doing so, they inflict no injury whatever upon Chattanooga.

To show that I am right in this statement, suppose the appellants should withdraw absolutely, and at once, from the carriage of Eastern traffic to Nashville. Would the rates from New York and other Eastern cities to Nashville be raised? Certainly not. They would remain just as they are; and the disparity which now exists between the Eastern rates to Nashville, and the Eastern rates to Chattanooga, would continue to exist, just as at present. I have shown repeatedly above, from the findings of the Commission itself, that the appellants do not make the rates to Nashville; that they have no control over those rates; and that they have not even a voice in determining what they shall be.

I have shown from the findings of the Commission, that said rates are made by the Trunk Lines, and the Louisville & Nashville Railroad, operating through Cincinnati; and I have shown why it would be impossible for the appellants to induce the Trunk Lines, and the Louisville & Nashville Railroad, to agree to increase those rates.

The Commission, speaking of the Trunk Lines and the Louisville & Nashville Railroad, said:

"These carriers established rates and united in joint tariffs from Eastern points to Nashville, long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

Assuming the fact to be as stated by the Commission, it is apparent that if the Trunk Lines in connection with the Louisville & Nashville Railroad established the present rates from Eastern points to Nashville, before the lines through Chattanooga engaged in the Nashville business, the Trunk Lines and the Louisville & Nashville Railroad would continue to carry the Eastern business to Nashville at the same rates after the appellants should have been forced by the order of the Commission in this case to withdraw from the Nashville business. *The result therefore of enforcing the Commission's order would not be to change the present relative adjustment of rates as between Nashville and Chattanooga in the least.*

The Trunk Lines and the Louisville & Nashville Railroad cannot increase the Eastern rates to Nashville. And the appellants cannot reduce the Eastern rates to Chattanooga, without sustaining a loss in revenue not only on all Eastern traffic carried to Chattanooga, but also on all Eastern traffic carried to Dalton, Rome, Atlanta and the remainder of the twenty-four Southern cities which have the same Eastern rail and water rates as Chattanooga.

To be sure, if the present Eastern rates to Chattanooga are

unjust and unreasonable, in and of themselves, they must be reduced to the proper figures, even if it results in the bankruptcy of every appellant in this case. I do not contend that the solvency or insolvency of a railroad company is the slightest justification for any violation of the law; but the proposition for which I am contending in this section of my argument assumes, as I have before stated, that the Eastern rates to Chattanooga *are* just and reasonable, in and of themselves; and if they be so, I contend that the appellants ought not to be forced to reduce them below what is just and reasonable, when to do so would not benefit Chattanooga in the least, but would involve the appellants in a serious loss of revenue

All three of the limitations suggested by me at the head of this section are entirely practical.

Though the question of the reasonableness of the rates to Chattanooga, the shorter distance point, involves, as is hereinafter shown, a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Nashville subserves the public interest; whether it is real; and whether it is such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellants on traffic to Nashville yield a profit over the additional cost of the movement of that traffic. For, while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a railroad will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined; and such increase represents what is called the "*additional cost of movement.*"

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison

between the dissimilarity of conditions and the disparity of rates," suggested by Judge Severens.

It may be contended by counsel for appellee that if I am correct in the position taken by me, to the effect that if the appellants should withdraw from carrying Eastern traffic to Nashville, the Trunk Lines, in connection with the Louisville & Nashville R. R., would continue to carry said traffic, at the same rates as are now charged, I must be incorrect in another position taken by me, to the effect that the Eastern cities, as well as Nashville, are interested in the appellant lines, being allowed to compete for said traffic.

The contention of counsel for appellee is that unless the withdrawal of appellants from the carriage of Eastern traffic to Nashville would result in an *increase in the rates* from the East to Nashville, neither the Eastern cities, nor Nashville, would be injured by such withdrawal. But the contention overlooks the fact that the beneficial effects of competition are manifested in many ways besides in the mere reduction of rates. Politeness of railroad officials; excellence of track and cars; speed of trains; promptness in the receipt and delivery of freight; care in the handling of freight in depot, and on train; liberality and promptness in the adjustment of claims for lost or damaged freight; are only a few of the many beneficial effects of competition which are entirely distinct from the rates charged for transportation.

In this case, it appears that though the rates from the East to Nashville have, for many years, been precisely the same via Cincinnati, as via Chattanooga, (Trans. p. 45)—the appellant lines now carry, via Chattanooga, more than one-half of the Eastern traffic to Nashville; notwithstanding the fact that in former years 90 per cent. of that traffic was carried via Cincinnati to Nashville.

Trans. p. 206.

These facts prove that though *rates* may be the same by all competing lines, there may exist many reasons why the public should prefer one of the lines to the other.

XLIV.

The Argument of Appellee that While Some Difference Between the Rates to Nashville and the Rates to Chattanooga May be Justifiable, the Present Difference is Too Great.

It is said that the difference between the Eastern rates to Nashville, and the Eastern rates to Chattanooga, is so great that in certain instances it has been possible to ship freight from New York, through Chattanooga, to Nashville, and then back from Nashville, through Chattanooga, to points south and east of Chattanooga, at less rates than those which would have to be paid if such freight were shipped from New York direct to Chattanooga, and thence to points of ultimate destination. Some isolated instances of that kind were proven by some of the witnesses; but Mr. van den Berg testified that in quite a number of other instances the combination of the rates is in favor of Chattanooga.

Trans. pp. 132, 133.

But assuming the fact to be as stated by the other witnesses, how will the evil, if it be one, be remedied by the enforcement of the order "as made" by the Commission in this case?

The order of the Commission is that the appellants shall desist from charging "ANY" higher rates on Eastern traffic to Chattanooga than they may be charging at the same time on Eastern traffic to Nashville. The testimony shows that the loss of net revenue to the appellants would be very much less by abandoning the Eastern traffic to Nashville, than it would be by reducing their Eastern rates to Chattanooga, and the twenty-four other Southern cities with which Chattanooga is grouped; and of course the appellants will adopt that line of action which involves the least loss of net revenue. They will abandon the Eastern traffic to Nashville; and they will continue to maintain their present rates on Eastern traffic to Chattanooga; provided those rates are just and reasonable within the purview of the first section. The result will be that the disparity which now

exists between the Eastern rates to Chattanooga, and the Eastern rates to Nashville, will continue to exist as heretofore; and if that disparity is such as to enable freight to be shipped from Eastern cities, via Cincinnati, to Nashville, and from Nashville, through Chattanooga, to points south or east of there, such shipments can be made hereafter, if they have been made heretofore.

The Commission was quite right in stating (as it did in its report and opinion) that the "complainant's case was presented on the theory that the prohibitive requirements of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation."

Trans. p. 55.

There was no middle ground for either party to assume. There is no possible mode of "*measurably*" adjusting the relation between Nashville and Chattanooga, as to Eastern rates. Neither the appellants nor their Trunk Line rivals can increase the Eastern rates to Nashville; and the appellants must accept those rates just as they are, or abandon the Nashville traffic absolutely and altogether.

On the other hand, if they should attempt to reduce the Eastern rates to Chattanooga, unless they should carry the reduction to the point of making those rates the same as the Eastern rates to Nashville, the advantage in favor of Nashville would still continue; though it might differ somewhat in degree. If the appellants should reduce the Eastern rate to Chattanooga to the same as the rates to Nashville, they must also make the same reduction in the Eastern rates to Dalton, Rome, Atlanta, and the remainder of the twenty-four Southern cities, which have the same rail and water rates as Chattanooga.

The Commission did not feel prepared, upon the testimony before it, to make an order which might involve so serious a loss of revenue. The language of the Commission is:

"For these conditions, the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is

beyond their control, and the allowance of the same rate to the shorter distance point (Chattanooga) might reduce their revenues below the limit of fair compensation."

Trans. pp. 53, 54.

Again the Commission says:

"We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided."

Trans. p. 54.

Again the Commission says:

"On this ground also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga."

Trans. p. 55.

Notwithstanding the Commission has not made any order stating what reduction, if any, should be made in the rates to Chattanooga, this court is asked to put such a construction upon the order that was made by the Commission, as will necessarily have the effect to either compel the appellants to reduce the Eastern rates to Chattanooga, to the full extent of the difference between those rates and the Eastern rates to Nashville, or abandon the Nashville traffic altogether.

In other words, this Court is asked by a process of construction to give an effect to an order made by the Commission which would result in consequences that the Commission itself was not willing to assume, with the evidence that it had before it; and the evidence taken in the Circuit Court did not materially alter this feature of the case.

XLV.

The Argument of Appellee Would Compel the Adoption of Mileage Rates Which are Impracticable in this Country.

While counsel for appellee contends that there should be some difference in rates in favor of Chattanooga as compared with Nashville, he does not suggest what the differences ought to be. His only suggestion is that the rates to Chattanooga ought not to be higher than the rates to Nashville.

Under the order made by the Commission in this case the appellants are enjoined from charging any greater compensation to Chattanooga than to Nashville, but they are not enjoined from charging as great compensation to the former as to the latter. Such an order is intelligible under the *fourth* section; but it is wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of Nashville, to charge less to it than to Chattanooga, it constitutes unjust prejudice against Chattanooga to charge *as much* to it as to Nashville. If distance is to be the controlling factor in determining whether undue preference or undue prejudice exists in a given case, *all rates must be constructed upon a mileage basis;* and instead of permitting the appellants to charge as much to Chattanooga as to Nashville, the Commission, if it has any power to prescribe future rates, should have ordered the appellants to charge less to Chattanooga; and so reduce their rates to Chattanooga as to make them the same per ton per mile, as those charged to Nashville. In a word, the Commission, if it has any power to prescribe future rates, should have ordered the appellants *to construct their tariff on a mileage basis.*

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it.* But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of Ransome vs. E. C. Ry., on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

First, because "*it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal,* OR BY A SHORTER OR OTHERWISE CHEAPER RAILWAY, *and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.*"

Second, "It would prevent railway companies from making perfectly fair arrangements for carrying, at a lower rate than usual, goods brought in large and constant quantities, *or from carrying for long distances at a lower rate than for short distances.*"

The report continues: "In short to impose equal mileage rates on the company *would be to deprive the public of the benefit of much of the competition* which now exists, or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and to *perpetuate monopolies*, in carriages, trade and manufacture, *in favor of those routes and places which are nearest* and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, *not that the rates they themselves pay are too high, but that the rates which others pay are too low.*"

In March, 1885, the Senate appointed a select committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages, and made a report, which, with its appendix, fills over 200 pages, and in its report it embodied the report of the English Parliamentary Committee, quoted above.

See Report of Senate Select Committee on Interstate Commerce, Jan., 1886, p. 57.

In the case of I. C. C. vs. Alabama Midland Ry. Co., Judge Bruce said: "In the case at bar there are questions of competing

lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same; and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231. I. C. C. vs. Alabama Midland Ry. Co.

In the case of Imperial Coal Co. vs. Pittsburg & L. E. R. Co., it was said by the Commission that "in determining the question of undue prejudice from a rate, distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interests of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. vs. Pittsburg & L. E. R. Co. 3d head note.

In the case of Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., decided December 31, 1897, the Commission said:

"Upon the other hand, it often happens that *distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co.

In the case at bar, the Court is asked to hold that the mere fact that a greater rate is charged for a shorter than for a longer distance constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone;* and it must be sustained, if at all, upon the theory that distance should control in rate-making, to the disregard of all other circumstances and conditions.

XLVI.

If the Failure to Charge According to Distance Constitutes an Undue Preference, All Rates Will Have to be Made on a Mileage Basis.

Counsel for the appellee may contend that, inasmuch as the order of the Commission is simply that the rates to Chattanooga shall not be higher than those to Nashville, it may be complied with by fixing the Chattanooga rates as high as those to Nashville; and that this privilege or option given to carriers to fix rates to Chattanooga as high as to Nashville, *thus ignoring the natural advantage of the former in being the shorter distance point*, is all that can be asked by the carriers, "*and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case.*"

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such an expression as "the Commission ignoring the natural advantages of shorter distance points."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi-judicial tribunal, what right has it to "ignore the natural advantages" of shorter distance points, if they have the legal right to enjoy those advantages?

I have hereinbefore shown that if it constitutes unjust preference in favor of Nashville to charge less rates to that place than to Chattanooga, it constitutes unjust prejudice against Chattanooga to charge *as high* rates to Chattanooga as to Nashville; and that if distance is to be the controlling factor, the rates

to Chattanooga, and to Nashville, respectively, as well as all other rates, must be constructed *on a mileage basis.*

If Chattanooga is entitled to have its rates constructed on a mileage basis, neither the Commission nor the Court has the right to "ignore its natural advantage" in being the shorter distance point.

But if it be held that Chattanooga is entitled to have its rates constructed on a mileage basis, every other city and station in the United States has the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad to subject Chattanooga to any unjust prejudice; and if it is entitled to have rates constructed on a mileage basis, the Commission and the Court, as well as the railroads, should say so, and not "ignore its natural advantage" by subjecting it to rates *as high* as those to Nashville.

When counsel contends that the privilege given the carriers to charge Chattanooga rates as high as those to Nashville, "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," he concedes that a dissimilarity of conditions *has* resulted from that competition; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity to permit the carriers to charge to Chattanooga rates *exactly as high* as those to Nashville, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

I hereinbefore showed that it is practically impossible to construct rates upon any "scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is equally impossible to affirm, with any basis of reason to support it, that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition."

XLVII.

Neither the Common Law, Nor the Act to Regulate Commerce, Requires Equality of Charge Except Where the Services are Similar.

In the case at bar Judge Severens says: "Now I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga, and to Nashville and Memphis through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, *and that the equality which the Commerce Act was enacted to secure* has been utterly disregarded."

Trans. p. 370.

Again he says: "If for such causes as existed here such *unequal* charges can be made along the same line of traffic the inevitable result must be that the Commerce Act will prove of no value, and the leading principle of the common law relating to the same general subject will be overthrown."

Trans. p. 373.

Neither the common law nor "the Commerce Act" requires "equality" of charge *except where the services are similar.*

In the case of I. C. C. vs. B. & O. R. R., 145 U. S., 275, Mr. Justice Brown, speaking for this Court, says:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (citing cases), though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services.*"

It has been held by this Court in the "Import Case," as well as in the "Alabama Midland Ry. Case," and in the "Behlmer Case," that the service rendered by a carrier in the transportation of traffic to a competitive point is not "similar" to the service rendered in the transportation of traffic to a non-competitive point. Therefore a person shipping to a non-competitive point is not entitled to an "*equality*" of charge with one shipping to a competitive point.

In Ex Parte Koehler, 31 Fed. Rep , p. 321, Judge Deady said: "The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the the result to circumstances over which it has little, if any, direct control."

In the case of Brewer & Hanleiter vs. Central of Georgia Railway Co. (84 Fed. Rep., p. 268), Judge Speer said:

"Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an "equality"

of charge, there is no use for the first section of the Act, which requires that rates be reasonable; nor for the second section of the Act, which prohibits unjust discrimination; nor for the third section of the Act, which prohibits undue preference; nor for the fourth section of the Act, which prohibits a greater charge for a shorter than for a longer distance, etc. If the law be that all rates shall be equal, or that all rates shall be equal in proportion to mileage, the first four sections of the Act are wholly unnecessary.

XLVIII.

The Act to Regulate Commerce did not Intend to Stifle Competition.

In the case at bar, Judge Severens says:

"If the fact of such competition is allowed to become a dominating factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened and the favored places grow prosperous in the sacrifice of others." . . . . "With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency."

Trans. p. 373.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the relative charges for transportation, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate *at all*, it *necessarily* becomes a *dominating* factor in fixing the relative charges for transportation to the different places along the line of a railroad.

As said by Judge Deady:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freights at lower rates than others not so favored."

31 Fed Rep. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the Act, which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement or combination for pooling; a practice which is supposed by some to have a tendency to stifle competition.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said that:

"It was not the design of the act to stifle competition."
154 U. S., p. 281, I. C. C. vs. B. & O. R. R. Co.

If it was not the design of the Act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at lower rates than others not so favored, are the competing lines to be censured for the disadvantage under which those places labor at which no competition exists?

XLIX.

The Discrimination Which Exists in This Case Against Chattanooga Is Not Caused by Any Fault or Contrivance of the Appellants.

Judge Severens speaks of the shorter distance points as being "*blighted* by the disadvantage with which they are burdened."
Trans. p. 373.

Now, if it be conceded, for the sake of argument, that he is correct in describing them as "blighted," are the competing lines censurable for the "blighted" condition of those places?

The question is well answered by Judge Deady, as follows:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circum-

stances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."

23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get or abandon the field, and let its road go to rust."

31 Fed. Rep., 319, Ex Parte Koehler.

L.

The Preference Which Exists in This Case in Favor of Nashville is not Caused by any Fault or Contrivance of the Appellants.

Judge Severens speaks of the longer distance points as "favored places;" and says they "grow prosperous in the sacrifice of others."

Trans. p. 373.

In what sense is the longer distance point, Nashville, "favored?" Is it favored in any other sense than that the Trunk Line rates have been extended to that point? If it be lawful and proper to extend the Trunk Line rates from New York to Pittsburg, or from New York to Columbus, or from New York to Cincinnati, or from New York to Louisville, or from New York to Evansville, or from New York to Cairo, why is it not lawful and proper to extend them from New York to Nashville?

If the Trunk Line Roads, in connection with the Louisville & Nashville Railroad, have acted legally and properly in extending the Trunk Line rates from New York to Nashville, have not the appellant lines, which reach Nashville through Chattanooga, the right to meet the Trunk Line rates at Nashville—provided the Nashville traffic pays them anything over the additional cost of its movement?

The distance from New York, via Bristol and Chattanooga, to Nashville, is, as I have shown above, precisely the same as the distance from New York, via Cincinnati, to Nashville, viz.: 1,052 miles.

The Commission finds and reports that the appellant lines, operating through Chattanooga, carry from 50 to 60 per cent. of the total tonnage moving from the North Atlantic Seaboard to Nashville.

Trans. p. 42.

It appears, therefore, that the appellants not only have as short a line from Nashville to New York, as the line via Cincinnati, but that appellants' facilities for transportation are such as to have enabled them to secure fully one-half of the competitive traffic moving between the North Atlantic Seaboard and Nashville. Is it possible that they are to be censured because they have seen proper to compete for the Nashville traffic? Suppose the appellants should enter into a contract, agreement or combination with the Trunk Lines and the Louisville & Nashville Railroad to pool the Nashville traffic, and, in that way (as is supposed), to stifle competition, they would commit an offense against the pooling section of the Act to Regulate Commerce; or

if the appellants should enter into any "trust arrangements" with the Trunk Lines and the Louisville & Nashville Railroad to control the rates at Nashville, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. vs. Frt. Assn.

The appellants are therefore placed in this dilemma: If they enter into any contract, agreement or combination to stifle competition at Nashville, they violate one, and perhaps two, acts of Congress. If they compete with the Trunk Lines and the Louisville & Nashville R. R., in good faith, at Nashville (inasmuch as the necessary result of such competition is to force them to accept the same rates as the Trunk Line rates to Nashville), then, according to Judge Severens, they are guilty of "favoring" Nashville; which is but another way of saying that they give to Nashville an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

LI.

Nashville Has Not "Grown Prosperous in the Sacrifice" of Chattanooga.

When Judge Severens speaks of "the favored places" growing "prosperous in the sacrifice of others," in what sense does he use the word "sacrifice"? Can anyone show, or will anyone undertake to assert, that prior to the extension of the Trunk Line rates to Nashville by the railroads whose lines reach Nashville through Cincinnati, the rates from New York to Chattanooga were lower than they are now? If the rates to Chattanooga were not lower then than they are now, how has Chattanooga been injured, in a legal sense, by the extension of the Trunk Line rates to Nashville? It may be said that Chattanooga has been injured, in a commercial sense, because the extension of the Trunk Line rates to Nashville has enabled Nashville to compete with Chattanooga in certain articles, in certain territory, which Nashville could not have reached, but for the reduction in her Eastern rates which resulted from the extension of the Trunk Line rates to that point. But the appellants did

not extend the Trunk Line rates to Nashville; and they are neither legally nor morally censurable for the extension of those rates to Nashville. Upon this point the Commission finds and reports that the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati "established rates and united in joint tariffs from Eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business;" and that "the acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

The Commission further finds and reports that "the Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount."

Trans. p. 49.

But, whoever may be to blame for the extension of the Trunk Line rates to Nashville, the commercial statistics of the two cities demonstrate that Nashville has not "grown prosperous in the sacrifice" of Chattanooga. The Commission finds and reports that "during the last ten years *especially*," the growth of Chattanooga "has been extremely rapid, and it has become a manufacturing and commercial point of considerable importance."

Trans. p. 47.

Appellee's witness, Magill, testified that according to the City Directory, which was issued June, 1897, Chattanooga, with its immediate suburbs, had a population of about 49,000; that there were from fifty-five to sixty manufacturing establishments, and some twenty-five or thirty jobbing establishments.

Trans. p. 242.

"According to the United States Census, the population of Nashville increased from 16,988 in 1860 to 25,865 in 1870, which was an increase of 52 per cent. During the same decade, the population of Chattanooga increased from 2,545 to 6,093, which was an increase of 139 per cent.

The population of Nashville increased from 25,865 in 1870 to 43,350 in 1880, which was an increase of 67 per cent. During the same decade, the population of Chattanooga increased from 6,093 to 12,892, which was an increase of 111 per cent.

The population of Nashville increased from 43,350 in 1880 to 76,168 in 1890, which was an increase of 75 per cent. During the same decade, the population of Chattanooga increased from 12,892 to 29,100, which was an increase of 125 per cent.

During the three decades from 1860 to 1890, the average increase of population at Nashville was only 65 per cent., while during the same period the average increase of population at Chattanooga was 125 per cent.

These figures demonstrate that while the Trunk Line rates to Nashville may be less than the Southern rates to Chattanooga, yet the latter are so adjusted with reference to the other twenty-four Southern cities, with which she is grouped, that they have enabled Chattanooga to increase in population very much more rapidly than Nashville. It is therefore manifest that Nashville has not "grown prosperous in the sacrifice" of Chattanooga.

One of appellants' witnesses (Merriam) testifies that during the last ten years the *wholesale* business at Chattanooga has declined.

Trans. p. 253.

The fact that the *wholesale* business has declined in Chattanooga during the last seven years proves nothing. Jobbers and manufacturers, by shipping in carloads to large distributing points, like Chattanooga, can sell in less than carloads to retail merchants, delivering the goods direct from the cars into the retail stores; and thus dispense with the wholesale merchant entirely. Where goods can be handled in that way, in carload lots, at large distributing points, it is quite natural that the wholesale business, being no longer useful, should die out at Chattanooga, as well as elsewhere.

The Commission has recently considered the subject of ship-

ping in carloads, and selling in less than carloads, and in relation thereto, said:

"Other and unusual advantages are also realized through opportunities so afforded to favorably fill orders from such stores; to often sell small lots of goods delivered at destination without paying less than carload charges thereon, except upon reshipment from the point of concentration; to have the railway agent, or the warehouse manager under railway control, act as his forwarding agent without charge; *to compete with wholesale merchants in various sections without the cost of warehousing, cartage, and some other expenses necessarily involved in the carrying on of a locally established enterprise.*"

American Warehousemen's Association vs. I. C. R. R. Co. et al., 7 I. C. Rep., p. 562.

Appellee's witnesses state that when the prices in one place are higher than those in another because of discrimination in freight rates, or any other such cause, the sales made in the former will fall off in comparison with those made in the latter.

Trans. p. 242.

There is no discrimination in freight rates as between Chattanooga and the other twenty-four Southern cities with which she is grouped; because they all have the same Eastern rail and water rates. The discrimination which exists is as between those cities and Nashville. And though it may tend to the injury of Chattanooga in her competition with Nashville, *it is a discrimination not caused by the appellants.* They do not make the lower rates to Nashville; they do not even have a voice in determining those rates. The Trunk Lines and the Louisville & Nashville Railroad make those rates; and the appellant carriers must either accept them, or abandon the Nashville traffic.

If the Eastern rates to Chattanooga should be reduced, the same reduction would have to be made in the Eastern rates to the other twenty-four Southern cities with which she is grouped; and, therefore, the only increase of traffic which Chattanooga could expect from the reduction would be confined to that ter-

ritory in which she, and the other twenty-four Southern cities grouped with her, compete as against Nashville.

Appellee's witnesses state that low rates to a locality increase the commercial trade, and induce men to invest capital in business; that the greater the number of business houses, the greater the number of employes and of population; and that they advance the prosperity of a place in every respect.

Trans. p. 252.

What the witnesses intended to say is, that where one locality has rates which are preferentially low, as compared with the rates of a competing locality, the prosperity of the former will be advanced, etc.; because, if all the competing localities have equally low rates, there is no reason why one of them should increase in population or prosperity more rapidly than the others.

If increase in population is an evidence that a city has enjoyed preferentially low rates, then the wonderful increase in the population of Chattanooga, as compared with the increase in the population of Nashville referred to above, would indicate that Chattanooga, and not Nashville, has been in the enjoyment of preferentially low rates.

But if it were true that Eastern rates to Nashville are preferentially low, the appellants are neither censurable nor responsible for it. They do not make those rates; they are not even consulted as to what they shall be. Those rates are made by the Trunk Lines and the Louisville & Nashville Railroad; and the appellants must either accept them or abandon the Nashville traffic.

Appellee's witnesses state that relatively high rates to a locality, or rates which discriminate against a locality, have a tendency to retard its growth and prosperity; that they retard business in every respect, both manufacturers and merchants.

Trans. p. 246.

The increase in Chattanooga's population, as compared with the increase in Nashville's population, would indicate that Chat-

tanooga's rates, are *not* "relatively high." If, however, it were true that the difference in rates discriminates against Chattanooga, the appellants are not responsible for it. The appellants' rates from New York and other Eastern cities to Chattanooga are just and reasonable, in and of themselves; and such discrimination as exists against Chattanooga results alone from the fact that the Trunk Lines and the Louisville & Nashville Railroad, without consulting the appellants, and without even allowing them a voice in the matter, have seen proper to put into effect the present low line of Eastern rates to Nashville; which rates the appellants must accept or abandon the Nashville traffic.

LII.

The Great Length of Time During Which the Present Rate Adjustment Has Existed is Evidence That it is Right.

Appellee's witnesses differ as to the length of time during which the rates from the East to Chattanooga have been materially higher than the rates from the East to Nashville. They vary in their statements as to the time, from eight to twenty-five years.

Trans. pp. 254, 246.

When it is remembered, that so far as the records show, this is the first complaint that has ever been made by Chattanooga merchants of the rate adjustment from New York and other Eastern cities to Chattanooga, and to the other twenty-four Southern cities which have the same rail and water rates from the East as Chattanooga, the great length of time during which that adjustment has existed is strongly persuasive, if not absolutely convincing, that it is right The appellants' lines which serve Chattanooga and the other twenty-four Southern cities, with which she is grouped, would not have submitted, for so long a time, to an adjustment which fixes rates from the East to those cities materially higher than rates from the East to Nashville, unless the appellants' lines were satisfied that it was impossible to force the Trunk Lines and the Louisville & Nashville Railroad to in-

crease the Eastern rates to Nashville; and unless the appellants' lines were also satisfied that they could not reduce their own rates to Chattanooga, and the other twenty-four Southern cities with which she is grouped, without incurring a loss of revenue which they could not afford to sustain.

LIII.

Chattanooga and Other Shorter Distance Points Have not "Become Poorer."

Judge Severens, speaking of the rule of charging less for a longer than for a shorter distance, where competition compels the lower charge to the longer distance point, says:

"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever."

Trans. p. 373.

It is true that the density of population and of traffic is much greater in the States north of the Ohio and east of the Mississippi Rivers than it is in the States south of the Ohio; but the fact may be accounted for in many ways, other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe prevented European immigration to the South and induced it to the North. Among the immigrants were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North; while the South remained, until after the war, an exclusively agricultural country. Since the war, the industries of the South have become more diversified; and the local non-competitive stations in the South have prospered, since the war, in a ratio corresponding with similar non-competitive stations in the North.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations; and, by that process of development, such stations gradually increase in population, manufactures,

etc., until they become so large as to invite the construction of other railroads; and in time they develop into competitive points. The process is gradual, and necessarily slow; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes; and it proposes, by an artificial process, to place non-competitive stations upon an arbitrary equality with the competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said:

"Congress never intended to make of this Act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted."

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LIV.

The Reduction of Rates to Chattanooga Would Not Increase Either the Tonnage or the Revenue of the Appellant Lines.

In the case at bar Judge Severens says:

"I am very strongly inclined to the belief that their (the carriers') interests would, in the long run, be better promoted by adhering more closely to the rules of the statute than was done in the present case, or is likely to be done under the practice which their counsel endeavors to justify."

Trans. p. 373.

The practice to which Judge Severens refers is that of charging less for a longer than for a shorter haul where competition compels the acceptance of lower rates at the longer distance point. His Honor's idea is that if the shorter distance point were not charged more than the longer distance point, the traffic of the

shorter distance point would be increased, and, in that way, the carrier's revenue would be increased.

His Honor's opinion upon any question of *law* is entitled to the highest respect; for he is one of the most eminent jurists of the country. His opinion, however, as to the probable effect of any particular mode of rate-making is, of course, the opinion of one who has not had a very extended experience in traffic matters. But whatever weight may be given to his opinion upon the subject, his suggestion involves an experiment, the entire expense of which would have to be borne by the carriers. A similar suggestion was pressed upon Mr. Justice Brewer in the case of Chicago & N. W. Ry. Co. vs. Dey, and in reply thereto he said:

"Again, it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course, there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed Rep., p. 881, Chicago & N. W. Ry. Co. vs. Dey.

If the government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I have every reason to believe that the owners of railroad property would be more than willing to surrender the railroads to the government, at anything like a fair valuation. But so long as the government insists upon the railroads being operated by their owners, the owners ought not to

be forced to undertake costly experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railways is such as to justify us in assuming that their traffic managers have every motive to increase their revenues.

Counsel for the appellee in argument, in the Court below, quoted from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission, in which Mr. Walker expressed the same view as Judge Severens. But it is proper to say that neither Mr. Walker nor Judge Severens has ever had any experience in the operation of railroads in Southern territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people who inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and, consequently, the revenue of the railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant who sells the article to give the consumer the benefit of the reduction.* To illustrate my meaning:

Appellee's witnesses testify that transportation rates or charges enter into and affect the prices at which Chattanooga merchants *can* sell goods to consumers.

Trans. p. 244. Answer to 9th interrogatory.

The difference between the Eastern rates to Chattanooga, and

the Eastern rates to Nashville, is the following, in cents per hundred pounds, viz:

Classes	1	2	3	4	5	6
	23	20	26	31	24	18

Trans. p. 42.

It will be seen that the greatest difference is in the rate on 4th class; and that the difference on that class amounts to 31 cents per hundred pounds.

Among other articles in the 4th class is coffee.

Trans. p. 230.

A difference of 23 cents per hundred pounds on coffee amounts to less than 2½ mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to less than 2½ cents.

The difference in first class rates is 23 cents per hundred pounds.

Dry goods are first class.

Trans. p. 230.

On a hat weighing 6 ounces, a difference of 23 cents per hundred pounds would amount to only 86-1000 of a cent.

It is manifest, therefore, that a difference in rates such as exists in the case at bar, while it may be quite important *as affecting the profits of the merchants, is, in most instances, of no importance at all, so far as the consumer is concerned.*

Witness Smith states that the excess of Chattanooga over Nashville rates, from the East, is, in dollars and cents per carload of 24,000 pounds, the following, viz.:

Classes	1	2	3	4	5	6
	$55.20	$48.00	$62.40	$74.40	$57.60	$43.20

Trans. p. 232.

The profits of a wholesale merchant at Chattanooga as compared with the profits of a wholesale merchant at Nashville are, *when purchases are made in carload lots*, affected to the extent of the figures shown.

But consumers do not purchase in carload lots. And though the difference, when looked at from the standpoint of a wholesale merchant when he purchases in carload lots, seems quite great, yet, when looked at from the standpoint of a consumer who purchases in ordinary quantities, the difference is so infinitesimal that it is impossible for the retail merchant to make the change so as to give the consumer the benefit of the difference, even if the merchant is disposed to do so.

When reduced to its last analysis, this proceeding is nothing more than an application upon the part of wholesale merchants at Chattanooga to increase their profits at the expense of the appellant carriers.

Counsel for the appellee, however, insisted in argument, in the Court below, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered, however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a Railroad Commission, either State or Federal, to have his profits increased by diminishing the profits or dividends of railroad stockholders. Upon this point, in the case of Ricketts, Smith & Co. vs. Midland Ry. Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said:

"I think, therefore, that the reasonableness of the rate *is not to be tried by its effect upon the trade of the persons who have to pay it.* It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*

Appellee's witnesses state that a reduction in the rates on goods of all classes from New York and other Eastern cities to Chattanooga, so as to make the Chattanooga rates not higher than the rates to Nashville, would enable the Chattanooga *jobber* to name lower prices to his customers.

Trans. p. 248 Ans. to Interrogatory 10.

Such a reduction would enable Chattanooga *jobbers* to name lower rates to wholesale merchants; and it would perhaps enable Chattanooga *wholesale* merchants to name lower rates to retail merchants; but as just shown, *it would not have any appreciable effect upon the price paid by the consumer.* The question at last is, whether the appellant carriers shall be compelled to reduce their Chattanooga rates, if they are just and reasonable in and of themselves, merely to increase the profits of Chattanooga *jobbers* and *wholesale* merchants.

Appellee's witnesses state that a reduction in the rates on all classes of goods from New York and other Eastern cities to Chattanooga, so as to make them not higher than the rates to Nashville, would enable Chattanooga merchants to compete with Nashville merchants at all points and sell a greater volume of goods; and that this would increase the tonnage of the appellant carriers.

Trans. p. 249 Ans. to Interrogatory 12.

The argument sought to be deduced from the opinion thus expressed by the witnesses is, that the appellants' tonnage would be so increased that they would realize more net revenue from the Chattanooga traffic, at the reduced rates, than they realize from it at the present rates.

It is manifest, however, that the only effect of the reduction would be to divert a certain amount of tonnage from Nashville to Chattanooga, and the other twenty-four Southern cities with which Chattanooga is grouped; and therefore, while it would be a *diversion* of tonnage, it would not be an *increase* of tonnage. No reduction of rates can cause an *increase* of tonnage *unless it be so great as to reach the consumer*, and confer upon *him* a practical benefit.

I have shown above that the reduction contended for would amount to less than 2½ cents upon ten pounds of coffee, and less than 2½ mills upon one pound of coffee; I have also shown that it would amount to only 86-1000 of a cent upon a hat. No one would drink more coffee, or wear more hats, because of such infinitesimal reductions in the prices of those articles. Unless rereductions in rates are so great *as to induce consumers to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reductions.

LV.

It is Not a Proper Function of Government to Attempt to Equalize Either the Business Facilities or Social Relations of Communities.

In the case at bar, Judge Severens, in commenting upon the practice of charging less for the longer than for the shorter haul, where competition compels the acceptance of lower rates at the longer distance point, says:

"And public policy would also be advanced by the opposite course, not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality* of privilege which it is one of the prime objects of legislation to promote."

Trans. p. 373.

I have hereinbefore shown that neither the common law nor the Act to Regulate Commerce requires "*equality* of privilege," except where the services are similar; and I shall have nothing further to say upon that point. But as to Judge Severens' suggestion that public policy would be advanced by building up one place at the expense of another, I submit that it is no proper function of government to deprive any place of the commercial advantages which it enjoys. When Judge Severens says that public policy would be advanced in the "encouragement which would thus be given to the distribution of commerce and population," he can mean nothing

else than that the commerce and population of Nashville ought, at least to a certain extent, to be taken away from it and given to Chattanooga. In reply, I repeat the language of Judge Deady, that:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer:

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hanleiter vs. Central of Georgia Ry., Speer, J., 84 Fed. Rep., p. 268.

LVI.

The Argument That as There are More Railroads at Chattanooga Than at Nashville, the Chattanooga Rates Should be Lower Than the Nashville Rates.

Counsel for appellee, in his argument in the Court below, and Judge Severens, in his opinion, alluded to the fact that there are more railroads entering Chattanooga than enter Nashville; and counsel insisted that if competition has the effect to reduce rates, the rates from New York and Eastern cities to Chattanooga ought to be lower than the rates to Nashville, instead of being higher as they are.

It is true that more railroads enter Chattanooga than enter Nashville.

It is also true that some of the railroads which enter Chattanooga are in active competition with each other. And it is by

reason of that fact that the rates from New York and other Eastern cities to Chattanooga are as low as they are. If the rates from New York and other Eastern cities to Chattanooga were made the sum of the local rates of the various carriers whose lines go to make up the through routes from New York to Chattanooga, they would probably be three times or perhaps four times as high as they are. It is the competition between those carriers, and the competition between Chattanooga and various other cities in Southern territory, that has caused the rates to Chattanooga to be as low as they are.

As stated above, Chattanooga has the same rail and water rates from New York and other Eastern cities as Atlanta, and twenty-three other cities located in Southern territory. Those rates have been fixed without regard to the distance from New York to those cities, severally. The rates were fixed upon the theory that as those cities competed with each other in the same territory, it was necessary that they should have the same rates, or the traffic would be diverted from one to the other. The carriers serving those cities, respectively, insisted upon their being allowed equal rates from New York and other Eastern cities. They made their insistence effective by rate wars, waged from time to time in the past; and frequently with disastrous results to the carriers, as well as the cities involved in them.

The rates in the territory in which Chattanooga is located have not only been reduced by competition between the various rail carriers serving the various competitive cities in that territory, but they have also been materially influenced by water competition.

The Interstate Commerce Commission in its First Annual Report, speaking of that territory, said:

"A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study.

The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions."

First Annual Report Interstate Commerce Commission (1887), p. 16.

Chattanooga has obtained the full benefit of all those competitive conditions in the rates which she now enjoys from the East; and she does not understand why Nashville, with only two railroads, should have succeeded in obtaining lower rates from New York and other Eastern cities than Chattanooga has obtained.

A moment's reflection, however, will enable us to understand the matter. I have above repeatedly referred to the finding of the Commission that the rates from New York, via Cincinnati, to Nashville are made by the Trunk Line roads from New York to Cincinnati, and the Louisville & Nashville Railroad from Cincinnati to Nashville. The distance from New York to Cincinnati is 757 miles; the distance from Cincinnati to Nashville is 295 miles; and the distance from New York via Cincinnati to Nashville is 1,052 miles. It will be seen, therefore, that the Trunk Line mileage from New York to Cincinnati represents 75 per cent. of the total mileage from New York, via Cincinnati, to Nashville.

Trans. p. 45.

The Trunk Line rates from New York to Cincinnati are the result of competition between the various rail lines running from New York and other Eastern cities to Chicago, St. Louis, Indianapolis, Cincinnati, Louisville, Evansville and other Western cities. That competition has resulted in extremely low rail rates between all points in Trunk Line territory; and the vast volume of traffic has enabled the railroad carriers in that territory to accept the low rates which such competition has forced upon them, and yet, in some few instances, to escape financial ruin.

Although Nashville is not located in Trunk Line territory, it has obtained the benefit of the low Trunk Line rates prevailing

between New York and Cincinnati, as fully as though Nashville were located upon the Ohio River. In other words, traffic shipped from New York, via Cincinnati, to Nashville, is carried by the Trunk Lines from New York to Cincinnati, at precisely the same rate as if it were destined to stop at Cincinnati.

Trans. p. 42.

Nashville, having received the benefit of the low Trunk Line rates for 75 per cent. of the entire distance from New York to Nashville, has the further advantage of being an important commercial centre located at the intersection of the Louisville & Nashville Railroad with the Cumberland River, and the Nashville, Chattanooga & St. Louis Railway.

The Louisville & Nashville Railroad is interested in maintaining the commercial importance of Nashville as related to that of Cincinnati, Louisville, Evansville and Memphis. This cannot be done, unless Nashville is given such rates from New York and other Eastern cities as will enable Nashville to compete with Cincinnati, Louisville and Evansville in the territory between Nashvillle and the Ohio River; and to compete with Memphis in the territory between Nashville and the Mississippi River. The rates from New York and other Eastern cities to Nashville are already higher than the rates to Cincinnati, Louisville and Evansville, (Trans. p. 42); and if the rates to Nashville were made any higher than the present rates, it would be utterly impossible for Nashville to compete with either one of those three cities. (Trans. p. 127; Ans. 12). The testimony of Mr. van den Berg and of Mr. Gallagher, taken in the Circuit Court, proves the additional fact that if the rates from New York and other Eastern cities to Nashville were materially increased a portion of the traffic would be diverted from the Louisville & Nashville Railroad to steamboats plying between Evansville and Nashville.

Trans. p. 127. Ans. No. 11; p. 135. Ans. 24; pp. 210, 211.

The Commission found as a fact that there is no actual competition at the present time by water at Nashville. The Commission restricted its findings in regard to water competition at Nashville to boats plying between *Cincinnati* and Nashville.

(Trans. pp. 48, 49, 50.) The testimony shows, however, that the distance from Evansville to Nashville, by water, is less than one-half the distance from Cincinnati to Nashville, by water. (Trans. p. 178.) And whatever may be the potentiality of water competition from *Cincinnati* to Nashville, the testimony of van den Berg and Gallagher shows that if the Louisville & Nashville Railroad should attempt to materially increase the rates from New York and other Eastern cities to Nashville, the danger of diverting Eastern traffic to steamboats plying between *Evansville* and Nashville is so great that no prudent traffic manager of the Louisville & Nashville Railroad would dare to make the attempt. It is the combined operation of the causes above mentioned which has resulted in the rates from New York and other Eastern points to Nashville being lower than the rates to Chattanooga; notwithstanding only two railroads enter Nashville.

It is evident that the Louisville & Nashville Railroad would, if it could, increase the proportions which it now receives out of the rates from New York and other Eastern cities to Nashville. Manifestly it does not accept those low proportions out of any mere love or preference for Nashville. That corporation is not chartered for charitable purposes; and it is not generally supposed to be actuated by motives of mere benevolence. There must be some sensible business reason why that company accepts such low proportions of the Eastern rates to Nashville. And Mr. van den Berg, its traffic manager, tells us the reason is that if that company should demand higher proportions, and thereby increase the aggregate rates from New York to Nashville, it would, in the first place, prevent Nashville from competing with Louisville and Evansville (Trans. p. 127; Ans. No. 12); and in the second place, divert a portion of the traffic from the Louisville & Nashville Railroad to steamboats plying between *Evansville* and Nashville. In other words, Eastern freight would be shipped via the Trunk Line roads from New York to Evansville, instead of being shipped via the Trunk Line roads from New York to Cincinnati; and when the freight reached Evansville, a portion of it would go from Evansville to Nashville by river instead of via rail.

Trans. p. 127, Ans. No. 11; p. 135, Ans. No. 24.

Mr. van den Berg has no motive to misrepresent the matter; while he has every motive and every opportunity to understand fully the effect that would result from increasing the Eastern rates, via Cincinnati, to Nashville. The opinion which he has expressed, to the effect that an increase in the Eastern rates to Nashville would divert a portion of the Eastern traffic from his line to steamboats plying between Evansville and Nashville, is corroborated by Mr. Gallagher, the general freight and passenger agent of the steamboat company which operates a line of boats between those cities, who states what rates his company would be willing to accept on Eastern traffic; and that a sufficient amount of steamboat tonnage could be obtained to move it.

Trans. pp. 172, 173–176.

LVII.

The Argument That There is no Real Competition at Chattanooga; and That This is the Reason Why the Chattanooga Rates are Higher Than the Nashville Rates.

The Commission found as a fact that the rates to Chattanooga, and the twenty-four Southern cities with which Chattanooga is grouped for rate-making purposes, were established by the Southern Railway & Steamship Association, of which the appellant lines were members.

Trans. p. 48.

Upon this fact, as found by the Commission, counsel based an argument in the Court below, that there is no real competition at Chattanooga; because the competition is conducted under rates, which, as he contends, but I deny, are agreed upon by the various lines that enter Chattanooga.

There can be no permanent competition between rail carriers that will not be absolutely destructive of all public interests, unless such competition can be conducted under rates which are substantially the same by all of the competing lines. A merchant, A, who ships his freight from New York to Chicago, via the New York Central Railroad, must have substantially the

same rates as his rival, B, who ships the same kind of freight from New York to Chicago, over the Pennsylvania Railroad; or his rival, C, who ships the same kind of freight from New York to Chicago, over the Erie Railroad; or his rival, D, who ships the same kind of freight from New York to Chicago, over the Baltimore & Ohio Railroad.

It is impossible, however, for those four Trunk Line railroads to use the same rates unless each knows what rates the others are charging. And the mere fact that competition may be conducted under rates which are known to all of the competitors does not prevent the competition from being real and effective.

LVIII.

The Argument that the Louisville & Nashville Railroad Company has Used its Power as a Majority Stockholder in the Nashville, Chattanooga & St. Louis Railway to Favor Nashville to the Detriment of Chattanooga.

A stipulation by counsel has been filed in this case, in which it is agreed that the capital stock of the Nashville, Chattanooga & St. Louis Ry. is $10,000,000.00, and is represented by 100,000 shares. That the Central Trust Company of New York, as trustee, holds 55,005 shares of said stock, in trust for the Louisville & Nashville Railroad Co.; and that said stock was purchased March 1, 1882. That said Louisville & Nashville Railroad Co., for the fiscal year ending June 30, 1896, received as income or dividend on account of said stock, $220,060.00. That the affairs of said Nashville, Chattanooga & St. Louis Ry. are managed by a Board of Directors consisting of fifteen members, who are chosen by the stockholders from their own body; that the President of the company is elected by the directors from among their own number; and that in all elections for directors each share of stock is entitled to one vote.

It is further agreed in said stipulation that J. W. Thomas, President; Geo. R. Knox, General Freight Agent, and W. L.

Danley, General Passenger Agent of the Nashville, Chattanooga & St. Louis Railway; and M. H. Smith, President; S. R. Knott, First Vice President, and Y. van den Berg, Traffic Manager of the Louisville & Nashville Railroad Co., would testify to the following as facts; and that the same may be considered by the Court, as if the depositions of said witnesses had been duly taken in this case, and they had testified thereto. Said facts are as follows: That the Nashville, Chattanooga & St. Louis Railway is a separate and distinct railway corporation; that it is managed and operated separately and apart from the Louisville & Nashville Railroad Co.; and is managed and operated by a separate and distinct corps of officers, employes and servants. That the officers of the Nashville, Chattanooga & St. Louis Railway make the rates upon their different lines and branches according to their own policy and best judgment, and not under the direction, advice or supervision of the officers of the Louisville & Nashville Railroad Co. That the entire management of the Nashville, Chattanooga & St Louis Railway is under the control of a separate and distinct corps of officers and employes, from the President down; whose salaries are paid by the Nashville, Chattanooga & St. Louis Railway That the Nashville, Chattanooga & St. Louis Railway has a separate and distinct Board of directors from that of the Louisville & Nashville Railroad Co. *That the Nashville, Chattanooga & St. Louis Railway is an active and actual competitor of the Louisville & Nashville Railroad for traffic at all points where it comes in competition with the Louisville & Nashville Railroad.* That the Nashville, Chattanooga & St. Louis Railway competes as aggressively with the Louisville & Nashville Railroad for all traffic where it comes in competition with said company, as it does with any other railroad, or common carrier, for traffic at competitive points. That the Nashville, Chattanooga & St. Louis Railway *is an actual and active competitor with the Louisville & Nashville Railroad, for all traffic from Boston, New York and other Eastern cities, destined to Memphis and Nashville, Tenn.*

Trans. pp. 258, 259.

The fact that the Nashville, Chattanooga & St. Louis Ry. is an actual and active competitor with the Louisville & Nashville Railroad, for all traffic from Boston, New York and other Eastern

cities, destined to Memphis & Nashville, is further proven by the testimony of appellee's own witnesses wherein they state that the bulk of the traffic, from New York and other Eastern cities, destined to Nashville, *comes through Chattanooga*, and not through Cincinnati.

Trans. pp. 249, 252, 254. Answer to Int. 19.

From Chattanooga to Nashville, the traffic necessarily passes over the Nashville, Chattanooga & St. Louis Railway; whereas from Cincinnati to Nashville, it necessarily passes over the Louisville & Nashville Railroad.

While the Louisville & Nashville Railroad Co., as the majority stockholder, may be said to get the benefit of $\frac{55}{100}$ of the revenue which the Nashville, Chattanooga & St. Louis Ry. receives from the carriage of Eastern freights from Chattanooga to Nashville, yet if the Louisville & Nashville Railroad Co. could divert to its own line, via Cincinnati, such of those freights as have heretofore been carried by the Nashville, Chattanooga & St. Louis Ry., *it would get all of the revenue, instead of getting only* $\frac{55}{100}$. It is manifest, therefore, that there is competition of the most active and effective character between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Ry. for the carriage of Eastern traffic to Nashville.

Mr. Knox testifies that there was a time when perhaps 90 per cent. of the business reached Nashville through Cincinnati, Louisville, and other Northern gateways; but for a number of years past the bulk of this traffic has passed through Chattanooga.

Trans. p. 206.

It would seem, therefore, that not only has the competition between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, for the carriage of Eastern traffic to Nashville, been actual and aggressive, but so much so that the Nashville, Chattanooga & St. Louis Railway and its connections have succeeded in wresting from the Louisville & Nashville Railroad and its connections a very material proportion of the traffic.

It would also seem to be very unjust to compel the Nashville, Chattanooga & St. Louis Railway, after its protracted and successful struggle with its rival, to abandon a traffic from which it realizes from $20,000 to $25,000 per annum.

It is doubtless true that the rates realized by the Nashville, Chattanooga & St. Louis Railway from that traffic yield only a small margin of profit over the additional cost of moving the traffic; but whatever the profit may amount to, it is that much revenue which goes to pay the company's operating expenses.

While the Louisville & Nashville Railroad is interested in maintaining the present rates from New York, *via Cincinnati*, to Nashville, so as to protect Nashville in its relations to Cincinnati, Louisville, Evansville and Memphis, it is not interested in having as low rates charged from New York, via Chattanooga, to Nashville, as are charged *via Cincinnati*. The Louisville & Nashville Railroad doubtless has ample transportation facilities to carry every pound of traffic that moves from New York and other North Atlantic points to Nashville; *and it is interested in having all of that traffic carried via Cincinnati to Nashville.* It is 294 miles from Cincinnati to Nashville, via the Louisville & Nashville Railroad; whereas it is only 151 miles from Chattanooga to Nashville via the Nashville, Chattanooga & St. Louis Railway. If the traffic be carried from New York *via Cincinnati*, the Louisville & Nashville Railroad gets a haul of 294 miles, and it receives *all* of the revenue realized from that mileage. Whereas if the traffic be carried from New York, via Chattanooga, the Nashville, Chattanooga & St. Louis Railway gets a haul of only 151 miles, and the Louisville & Nashville Railroad gets the benefit of *only* 55-100ths of the revenue received from that mileage.

The Louisville & Nashville Railroad, in agreeing with the Trunk Line roads to extend the Trunk Line rates to Nashville and Memphis, was not actuated by any motive to injure Chattanooga. Its sole motive was to protect Nashville as related to Cincinnati, Louisville, Evansville and Memphis.

I have shown that for many years, for rate-making purposes, Chattanooga has been grouped with twenty-four other Southern cities lying in the States of Georgia, Alabama and Mississippi (Trans. 48); and on Diagram No. 4 (See ante p. 16) I have shown the geographical relation which exists between Chattanooga and those cities. They may be said, speaking generally, to lie on and south of the Tennessee River and east of the Mississippi River. On the other hand, Nashville has been, for many years, for rate-making purposes, considered as related to Cincinnati, Louisville, Evansville and Memphis.

Nashville and those cities may be said, speaking generally, to be Ohio, Cumberland and Mississippi River points. For rate-making purposes, each of these river points must be protected as against the other. Their respective commercial interests are almost exclusively confined within their own group, and they have but little concern with the group to which Chattanooga belongs. It is true that there is a narrow strip of territory between Nashville and Chattanooga in which the Nashville group may be said to compete with the Chattanooga group, and vice versa. But the main interests of the Nashville group lie north and west of Nashville; and the main interests of the Chattanooga group lie south, southwest and southeast of Chattanooga.

The Nashville group is served by carriers whose lines extend from New York via Cincinnati, Louisville, Evansville, and other Ohio River gateways to the South.

The Chattanooga group is served by a totally distinct set of carriers, whose lines extend from New York, via the Virginia and South Atlantic gateways, to the South.

The carriers who serve the Nashville group are dominated by the Trunk Line Association, which fixes the rates all the way from New York to the Ohio River.

The carriers who serve the Chattanooga group have no connection with the Trunk Line Association, and are entirely independent of its operation.

These different sets of carriers have different systems of classification, and unlike methods of rate construction; and it is to those differences that the Commission refers, when it says:

"It is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

It seems to me to be the refinement of cruelty to compel the appellant lines which serve the Chattanooga group to remove difficulties which are conceded to be inevitable; and to remove those difficulties by reducing their rates to Chattanooga and the twenty-four other Southern cities with which Chattanooga is grouped; while the carriers who serve the Nashville group, and who are alone responsible for the Nashville rates, are not required to contribute anything towards relieving the "inevitable" difficulties.

LIX.

The Second Section of the Act to Regulate Commerce Has no Application to This Case.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight vs. U. S., 167 U. S., pp. 516-518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same place of destination (Pittsburg.) The Court held that the phrase "under substantially similar circumstances and conditions," *as used in the second section*, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

As Chattanooga and Nashville are not the *same distance* from New York, and other Northeastern cities, the second section has no application to this case.

And so Judge Severens held.

Trans. p. 380.

LX.

The Order Made by the Commission in this Case is Not Lawful Under the First Section of the Act.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of this Court, in the case of I. C. C. vs. B. & O. R. R., said:

"That a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under section 2 and 3."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

I have hereinbefore shown that the disparity in rates in this case does not violate either the fourth, third or second section of

the Act. I shall therefore confine the concluding part of my argument to the question as to whether there is sufficient evidence in the record in this case to justify this Court in decreeing that the rates to Chattanooga are not reasonable within the purview of the first section of the Act.

In the case of Ames vs. U. P. R'y Co., Mr. Justice Brewer used this language:

"But the grave question still remains, are the rates prescribed in this Act as the maximum over which the railroad companies may not go unreasonable, and so unreasonable as to justify the Court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached."

64 Fed. Rep., 173, Ames vs. U. P. R'y Co.
C. M. & St. P. Ry. vs. Tompkins, et al. MS. Op. Oct. Term, 1899.

In the same case, reported under the style of Smyth et al. vs Ames et al. (known as the "Nebraska Freight Rate case"), the Supreme Court said: "How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question."

Smyth et al. vs. Ames et al., 169 U. S., 546.

In the case of U. S. vs. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, *what is a fair and reasonable profit*? That depends sometimes *upon the risk incurred*, and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a *fair return upon the capital that would have been*

sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article, and a reasonable profit allowed on that? And in such case would contribution *to a sinking fund to make repairs upon the roadbed and renewal of cars*, etc., *be assumed as a proper item?* Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that *it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.*"

The italics are mine.

166 U. S., pp. 331, 332.

In the case of Smyth et al. vs. Ames et al., Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, the *original cost of construction*, the amount expended in *permanent improvements*, the *amount and value of its bonds and stock*, the *present, as compared with the original cost of construction*, the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses*, are all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., p. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, "labyrinths of tables, figures, and estimates," were presented in the testimony, discussed by counsel in their briefs, and considered by the Court with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in:

64 Fed. Rep., pp. 179 to 194, Ames vs. U. P. Ry. Co.
78 Fed. Rep., pp. 263-275, Southern Pacific Co. vs. Board of Railroad Commissioners.
154 U. S., pp. 402-413, Reagan vs. Farmers' Loan & Trust Co.
Smyth et al. vs. Ames et al., 169 U. S., 466.

In the case at bar, there will not be found either in the testimony taken before the Commission, or in the testimony taken in the Circuit Court, any sufficient evidence of the various and numerous facts suggested by Justices Peckham and Harlan as proper to be considered in determining what are reasonable rates. Nor will there be found any sufficient evidence of the various and numerous facts that were actually considered by the courts in determining what were reasonable rates in the cases cited above.

I submit, therefore, that the evidence is wholly insufficient to enable either the Commission, the courts below, or this Court, to intelligently decide that the Chattanooga rates involved in this case are unreasonably high in and of themselves.

LXI.

The Burden is on the Appellee to Prove That the Chattanooga Rates are Unreasonably High in and of Themselves.

In the case of Harding vs. C. St. P. M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the

exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows with reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of Brewer & Hanleiter vs. Louisville & Nashville R. R. Co., decided in 1897, and which is one of the latest cases decided by the Commission, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself unreasonable is on the complainant.

See 7 I. C. Rep., p. 234.

Counsel for the appellee contended, in argument, in the Court below, that as the facts which are necessary to enable the Court to determine the reasonableness of rates are peculiarly within the knowledge of the appellants, the burden of proving those facts ought to be placed upon them.

The contention of counsel is directly antagonistic to the decision of the Commission in the two cases just cited. Counsel overlooked the fact that section 20 of the Act to Regulate Commerce authorizes the Commission to require annual reports from all interstate railroad companies, and to require from them "specific answers to all questions upon which the Commission may need information." Counsel also overlooked the fact that interstate railroad carriers make annual reports to the Commission, showing in detail many of the facts which are proper to be considered in determining the reasonableness of rates; and if any additional facts were desired by the Commission, all that it had to do was to call for them under the twentieth section of the Act.

Counsel for the appellee contended, in argument, in the Court below, that the appellants recognized that the burden of proof was upon them, by taking the testimony of certain expert witnesses, to the effect that, in their opinion, the Chattanooga rates are just and reasonable. The appellants, knowing that the Report and Opinion of the Commission would be relied upon as prima facie evidence of the facts, took their testimony in the

Circuit Court, in advance of any testimony that was taken in said Court, by the Commission; and not knowing what testimony the Commission would take in said Court upon the question as to the reasonableness of said rates, the appellants took said expert testimony; not because they supposed that the burden of proof was upon them, but to anticipate any proof upon the subject that the Commission might afterwards take.

LXII.

A Railroad Company is Entitled to a Fair Return Upon the Value of that Which it Employs for the Public Convenience.

"The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

64 Fed. Rep., 176, 177, Ames vs. U. P. Ry. Co.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S., 412, Reagan vs. Farmers' L. & T. Co.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169, U. S., 547.

LXIII.

In Order to Determine Whether the Rates of a Railroad Are Reasonable Its Operations as a Whole Must Be Considered.

In order to ascertain whether a railroad company has, during any given period, received reasonable compensation for the use of its property, it is necessary to know the result of its operations *as a whole*. The result of its operations as to any particular article, as coal, pig iron, etc., is of no value; because, though the railroad company may have carried some such articles at, or even under cost, the other articles carried by it may have yielded more than a reasonable profit upon the investment. And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with low rates charged on other articles the volume of traffic carried by it, taken as a whole, may be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. Co. vs. Dey, Mr. Justice Brewer said:

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed Rep., p. 881, C. & N. W. Ry. Co. vs. Dey.

In the case of Chicago, etc., Ry. Co. vs. Minnesota, Mr. Justice Miller, in a concurring opinion, said:

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature, or by its Commission, is by a bill in Chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation

from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the services rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. vs. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 An. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items, as for instance, coal, or pig iron, without taking into consideration the rates on any of the remaining five or seven thousand articles?

It is equally impossible to ascertain what would be reasonable rates for the transportation of any particular traffic separated from the main body of traffic carried by a railroad; as for instance, the particular traffic that is carried by the appellant lines from Eastern cities to Chattanooga.

To illustrate: Mr. Davant testifies that the amount of revenue derived by the Norfolk & Western Railroad, one of the appellants, from the carriage of freight shipped from New York and Boston to Chattanooga in 1892 was $19,000.70.

Trans. p. 152.

"The Statistics of Railways in the United States, 1892, Interstate Commerce Commission," pages 306, 307, show that for the year ending June 30, 1892, the total earnings of the Norfolk & Western Railroad from operation were $8,667,371.00. It will be seen therefore that the amount of revenue derived by the

Norfolk & Western Railroad from the carriage of freight shipped from New York and Boston to Chattanooga in 1892 was less than three-tenths of one per cent. of the total amount of revenue, derived by the said company from the operation of its road. How is it possible to single out three-tenths of one per cent. of the traffic of the Norfolk & Western Railroad, and determine that the rates, charged upon that particular traffic, are reasonable or unreasonable, without considering the rates charged by that road upon the remainder of its traffic, which constitutes 99 7-10 per cent. of the whole.

One of the errors which the Commission persists in committing is, that it will attempt, from time to time, to single out a particular traffic, like that which is carried by the Norfolk & Western Railroad, and its connections, from New York and Boston to Chattanooga, and to determine what is a reasonable rate for the carriage of that particular traffic; and while in this case the Commission expressly declined to determine what would be reasonable maximum rates to be charged, from Eastern cities to Chattanooga (Trans. p. 54-55), yet it has in other cases attempted to determine the reasonableness of rates where it was as impossible to do so as it is in this case.

The appellants are entitled to receive, from the entire body of their traffic, rates which will pay operating expenses, and a fair interest upon the actual value of their property; and the traffic carried by them from Eastern cities to Chattanooga should contribute its fair proportion to the total revenue which they are entitled to realize from its operation; provided competitive circumstances and conditions at Chattanooga will permit of it. But it is impossible to ascertain the fair proportion of that particular traffic, without considering the entire body of rates charged by the appellants.

LXIV.

The Memphis and Nashville Rates are of No Value in Determining the Reasonableness of the Chattanooga Rates.

The Commission in its Report and Opinion says: "When these carriers, for instance, charge seventy-three cents per hundred pounds on fourth-class freight from New York to Chattanooga, and, at the same time, carry like shipments 150 miles further to Nashville, for forty-two cents a hundred, and do this, not incidentally, but for a series of years, the belief that the higher rate is excessive becomes a positive conviction."

Trans. p. 54.

Judge Severens in his opinion says:

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted from the Memphis business considerably less than those at Chattanooga."

Trans. pp. 371, 372.

The Commission held that so far as the fourth section is concerned, appellants are justified by the existence of *water* competition, of controlling force, in charging less on traffic for the longer distance to Memphis. And, therefore, the Commission gave no relief to Chattanooga as against Memphis.

According to Judge Severens, however, though the Commission declined to grant relief to Chattanooga as against Memphis under the *fourth* section, the Commission could and should have used the Memphis rates as evidence that the shorter distance rates to Chattanooga are unreasonable, and, *in that way*, it could and should have granted relief against Memphis under the *first* section.

In the case of A. T. & S. F. R. R. vs. D. & N. O. R. R., 110 U. S., p. 684, this Court refused to use through rates as presumptive evidence that local rates are unreasonably high.

If Judge Severens is right, there is no use for either the second, third or fourth sections of the Act in any long and short haul case; because every such case can be disposed of under the first section. If a disparity of rates constitutes an unjust discrimination, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the second section, relief may be given under the first section. So, if a disparity of rates constitutes an undue prejudice, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the third section, relief may be given under the first section. And so, if a greater charge be made for a shorter than for a longer distance, then according to Judge Severens, the shorter distance rate is unreasonable; and dispensing with the fourth section, relief can be given under the first section.

But according to Mr. Justice Brown:

"A charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3." And he might have added, with equal propriety, "may create a greater charge for a shorter than for a longer distance, under such circumstances as to violate section 4."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

According to Mr. Justice Brown, the first section of the Act has a scope of its own, and covers a ground entirely distinct from that covered by either section 2 or section 3; and, I may add, entirely distinct from that covered by section 4.

Again, Judge Severens said:

"I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of

the law and by the general policy of the whole enactment, which is to effect the *equality* of charges."

Trans. p. 375.

I have heretofore shown that neither the common law nor the Act to Regulate Commerce requires "equality of charges," except where the services are similar; and therefore I submit that Judge Severens is in error in referring to "the general policy" of the Act as aiming at the "*equality* of charges." I also submit that he is in error in holding that "the first section is colored by the other provisions of the law;" for, as stated above, Mr. Justice Brown holds, in effect, that the first section has a scope of its own, which is distinct from that of any other provision of the law.

LXV.

No Comparison of Rates is of Any Value, Unless the Services be Similar.

In the case at bar, Judge Severens said:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service, etc."

Trans. p. 375.

I agree to that proposition; provided due importance be given to the word "*similar*."

Again, Judge Severens says:

"It seems to me clear, that the charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

Trans. p. 375.

I agree to that proposition also, provided the service performed in the case of the longer haul be "*similar*" to the service

performed in the case of the shorter haul. It is difficult, however, to imagine a case where a carrier would charge less for a longer than for a shorter haul, unless the circumstances and conditions of the two hauls were substantially *dis*similar.

LXVI.

It is not Fair to Compare Competitive Rates with Non-Competitive Rates; nor Competitive Rates Which Are Made Under a Certain Degree of Competition with Competitive Rates Made Under a Less Degree of Competition.

In the case at bar, Judge Severens said:

"Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, *for the presumption would always be* that the compensation charged for the service or thing is sufficient to be *reasonable*."

Trans. p. 375.

Again, he said:

"If, as I gather from the testimony, the through rates to Nashville afford a *fair* profit to the carriers, whether the Northern Trunk Lines or the respondents (*and it is reasonable to suppose they would not engage in the business without it*), there is substantial ground for contending that the same charge for carrying freight from the East to Chattanooga would afford a reasonable profit, and would therefore be a reasonable charge."

Trans. p. 375.

DIAGRAM No. 9.

I agree that if the competition from A to B, in Diagram No. 9, above, be substantially similar to the competition from C to D, then the rates charged from A to B may be fairly compared with the rates charged from C to D. But if the competition existing from A to B, between the two competing lines shown in the first figure on the diagram has been such as to result in abnormally low rates, while the competition existing from C to D has not had so depressing an effect, then I deny that any fair comparison can be made between the rates from A to B and those from C to D.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics, and other staple articles, at one per cent. profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant in the same town upon the *same articles*; for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell them at the same profit; and the fact that the profits of both merchants on those articles were controlled by the same degree of competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles and foreign dress goods? *In a word, it is fair to compare competitive rates with competitive rates, when the competition is substantially the same in both cases; and it is fair to compare non-competitive rates with non-competitive rates; but it is not fair to compare competitive rates with non-competitive rates; nor competitive rates made under a certain degree of competition with other competitive rates, which are made under a less degree of competition.*

When Judge Severens says that:

"The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable;*" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit," or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable" and "fair"

It may be said that a profit of one per cent. on salt, domestics, and other staple articles, is a "reasonable" and "fair" profit on those articles; or the merchant "would not engage in the business." And the profit may be, in fact, "fair" and "reasonable;" provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc. A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he may "fairly" and "reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair," and "reasonable," Judge Severens means that because a merchant accepts one per cent. profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him*, and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, for which no price had been previously stipulated, would destroy the mercantile business of the country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl, sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl as that which he accepts on domestics, and other staple articles.

LXVII.

There is no Such Presumption as that Competitive Rates are Reasonably High.

The proposition of Judge Severens, referred to in the last preceding section of this argument, is plausible and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows:

1. Rates charged by a carrier to a longer distance point must be reasonably high.

2. The rates charged by the appellants to the shorter distance point (Chattanooga) are higher than the rates charged by them to the longer distance point (Nashville).

3. Therefore, the rates charged by them to the shorter distance point (Chattanooga) are *un*reasonably high.

The fault in the syllogism is to be found in the major premise. And it consists in stating a fact as being true under all circumstances; which, though it may be true under certain circumstances, is not true under other circumstances; and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following:

1. Men are black.

2. George Washington was a man.

3. Therefore, George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high; and in that case, the major premise of the syllogism would be true.

But such competition either between market and market, or between product and product, or between carrier and carrier, may exist at the longer distance point, that the presumption, instead of being that the rates to that point are reasonably *high*, is that they are reasonably, or perhaps unreasonably, *low*.

In the case of Smyth et al. vs. Ames et al., this Court quoted the following from Mr. Justice Brewer:

"It must be remembered that these roads are competing roads; *that competition tends to a reduction of rates*—sometimes, as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

Smyth et al. vs. Ames et al., 169, U. S. 542.

In its Eleventh Annual Report, the Commission says:

"Rates to competing and distributing centers are not for the most part unreasonably high; they are frequently *quite low.*"

11 An. Rep., I. C. C. (1897), p. 14.

It is manifest, therefore, that there can be no such presumption, either of fact, or of law, as that the rates charged by carriers to longer distance competitive points yield a "reasonable" or "fair" profit, to which they ought to be restricted in their charges upon all other traffic carried by them.

LXVIII.

If Competitive Rates Are to Be Used as a Standard for Fixing Local Rates, the Rates on Low-Class Traffic Will Have to Be Used as a Standard for Fixing Rates on High-Class Traffic.

To illustrate my meaning, it will be seen from the Report and Opinion of the Commission in this case, that the rate from New York to Nashville on class 6 is 31 cents per hundred pounds; while the rate from New York to Nashville on class 1 is 91 cents per hundred pounds; making a difference in rates of 60 cents

per hundred pounds in favor of class 6, as against class 1, from New York to Nashville.

Trans. p. 42.

Now, if the low Trunk Line rates from New York to Nashville are to be used as a standard for fixing rates from New York to Chattanooga, why is it that the low Trunk Line rate to Nashville on class 6 is not to be used as a standard for fixing the Trunk Line rates to Nashville on the remainder of the six classes of freight? Why cannot the argument be made, that if Trunk Lines in connection with the Louisville & Nashville Railroad have, for a long series of years, carried traffic known as class 6 from New York to Nashville for 31 cents per hundred pounds, the presumption is, that it has afforded them "a fair profit," or "they would not engage in the business;" and if 31 cents per hundred pounds affords "a fair profit" for carrying class 6 from New York to Nashville, the higher rates charged by them from New York to Nashville upon the remainder of the six classes of freight must be unreasonably high? And yet, if anyone should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates to all points on the lower classes of traffic, compels them to accept exceedingly low rates to competitive points on all classes of traffic; and the sole compelling fact in both cases is competition. The reason why low class traffic can only pay very low rates is because of competition between *product and product*. Wheat shipped from the Northwest to Nashville comes into competition with wheat grown in Kentucky and Tennessee; and therefore wheat from the Northwest must be carried at a sufficiently low rate to enable it to compete in Nashville with wheat that is grown nearer to Nashville. Again, if the rate charged upon wheat, added to its cost at the place of production, makes the selling price of wheat in Nashville too high, as compared with corn, rye, etc., the amount of wheat consumed will diminish, and the deficit will be made up

from corn, rye or other grain. In a word, the only reason why exceedingly low rates are charged upon the lower classes of traffic is that *competition* between *product and product* compels it; and the only reason why rates to Nashville on all classes of traffic are less than the rates to Chattanooga is that competition by the Trunk Lines in connection with the Louisville & Nashville Railroad exists at Nashville, but does not exist at Chattanooga. If the Trunk Line competition which exists at Nashville, but does not exist at Chattanooga, is to have the effect to reduce Chattanooga rates to the level of Nashville rates, it should also have the effect to reduce the rates on high-class traffic to the level of the rates on low-class traffic, or to raise the rates on low-class traffic to the level of the rates on high-class traffic.

LXIX.

While the Nashville Rates do Not Yield as Much Profit as Carriers Might Otherwise Reasonably Demand, They May be Lawfully Accepted, Provided They Yield Some Margin of Profit Over the Additional Cost of Movement of Said Traffic.

I have hereinbefore commented upon the proposition contended for by the appellee, and sustained by Judge Severens, to the effect that the presumption is that the rates charged by carriers to longer distance points yield a reasonable profit, and therefore that higher rates charged to shorter distance points must yield an unreasonably high profit.

Counsel for the appellee, in his argument in the Court below, contended for another proposition which Judge Severens apparently approved, and which is entirely different from, and inconsistent with, the proposition upon which I have hereinbefore commented.

The other proposition may be put in syllogistic form as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.

2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.

3. Therefore, carriers ought not to be allowed to charge less for a longer than for a shorter distance, over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a "*reasonable*" compensation for transportation to a *competitive* point?

In the case at bar, the Commission said:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis (the longer distance points), *with reference to the additional expense incurred in carrying Eastern traffic to those destinations*, but whether that margin affords *reasonable* compensation for the services thus rendered cannot be determined from the evidence."

Trans. p. 51.

It is plainly inferable from the language just quoted that rates which merely yield a "margin of profit" over and above the additional expense incurred by the carrier in the transportation of the particular traffic upon which such rates are charged are not considered by the Commission to be "reasonable compensation" for the service; though the Commission does not tell us how much such rates would have to be increased before they would yield a "reasonable compensation."

My contention is that if *competitive* rates pay anything over and *above the additional cost of movement* of the competitive traffic, it is right and reasonable that they be accepted by the carrier, rather than abandon the competitive traffic. On the other hand, counsel for the appellee contended in his cross-examination of witnesses that competitive rates ought to be sufficient not only

to pay the *additional cost of movement* of the competitive traffic, but also the proportion of operating expenses, fixed charges, etc., which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier.

Trans. p. 142.

His proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself in 1887, In Re Southern Railway & Steamship Association (sometimes cited as In Re Louisville & Nashville Railroad Co.). In that case the Commission said:

"This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute towards both *fixed charges* and *cost of movement*. But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it *is simply the expense of its own handling and movement*: and, upon the supposition made, there might perhaps be gain to the road instead of loss in taking it at anything above half the rates which are levied upon other traffic corresponding to its classification. *It might, therefore, be carried at such rates without wrong to any one.*"

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission with reference to the lumber trade is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute towards all the operating expenses, and fixed charges of the carrier, then the courts will put an absolute embargo upon more than half of the tonnage now carried by the railroads of this country.

The Commission in its First Annual Report to Congress said:

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added."

See First Annual Report Interstate Commerce Commission [1887], p. 30.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them, severally, is equally applicable to the theory that the charges for the transportation of competitive and non-competitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in pro-

portion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why competitive traffic cannot be made to pay in proportion to the cost of transporting it, is, because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would be driven out of competition; the shorter line would secure a monopoly; and all competition would be destroyed.

The second fault in the syllogism referred to above in this section is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the carrier on traffic to longer distance competitive points. I have just shown that the Commission itself conceded, in the case at bar, that so far from there being any *loss* to the appellant carriers on traffic to Nashville, the longer distance point, there is a "margin of *profit;*" *at least with reference to the "additional expense incurred" in carrying that traffic to Nashville* (Trans. p. 51). In other words, *there is no loss at all.* The real ground of objection is, that the margin of profit is not as great as it should be; and the answer to the objection is, that if there is no loss upon the traffic carried to Nashville, the carriage of that traffic by the appellants has no tendency whatever to increase the rates to Chattanooga, or to any other point. On the contrary, the profit, however small it may be, which the appellant carriers may derive from the Nashville traffic enables them to improve and increase their facilities for handling the Chattanooga traffic, as well as the other traffic on their lines.

The third and greatest fault in said syllogism is to be found in the conclusion which is sought to be drawn from the major and minor premises.

If it were true that rates charged to longer distance competitive points do not yield proper compensation; and if it were true that their failure to do so causes a loss which the carrier tries to make up by increasing the rates to the shorter distance points; it is manifest that if the rates to the shorter distance points be

reduced to the same as the rates to the longer distance points, the loss to the carrier will be increased instead of being diminished. In other words, if the courts compel carriers in the Southern territory to accept to all of their stations rates as low as those which competition compels them to accept to the longer distance competitive points, the result must be the universal bankruptcy of the southern railway system.

LXX.

Railroad Traffic Managers do not "Have Everything their Own Way;" Their Rates are Made for Them by Competition.

In the case at bar, Judge Severens says:

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done."

Trans. p. 372.

Judge Severens is correct in saying that railroad traffic managers are animated with the desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that railroad traffic managers, in studying and adjusting the rates of traffic on their several lines, act "in the absence of the other

party," and that "they have everything their own way." The error is quite a popular one, and it grows out of a want of familiarity with the practical method of rate making in this country.

At the present day, it cannot be said that railroad traffic managers make their rates at all.

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept; and he must adopt, or closely approximate, those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager, in many of the States, is restricted by State railroad commissioners; and in every State he is restricted by competition between product and product, and between market and market; which kinds of competition have a controlling influence upon the rates which can be charged to and from even the most strictly local stations on a road. To illustrate: Cotton is raised on the line of the Central Railroad of Georgia (one of the appellants), and it is shipped from many of the local stations on that road. But that cotton is raised and shipped in competition with cotton raised upon other railroads in Georgia; and in competition with cotton raised upon railroads in other States. The Traffic Manager of the Central Railroad of Georgia must accept such rates on cotton from its local stations as will enable that cotton to be carried to, and sold in, the markets of the world, in competition with cotton raised upon the lines of other railroads in Georgia, and in other States; or the cotton cannot be moved at all. In that event, the Central Railroad of Georgia will lose the revenue that it might otherwise realize from the transportation of cotton from its local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be obtained for cotton in the market, the cotton will not move from the local stations; and the railroad will lose the revenue which it might otherwise realize from the transportation of local cotton. It is necessary, therefore, that the traffic manager acquaint him-

self, not only with the rates which other railroads are accepting for the transportation of cotton for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do without full consultation with the farmer who raises the cotton, and the merchant who buys it. The same is equally true of corn, wheat, other grain, live stock, and, in fact, of everything produced along the line of a railroad, for shipment from its local stations. Whenever any of those products is offered for shipment at a local station, it is offered with full knowledge that its transportation must be conducted in competition with the transportation by other railroads, of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of railroad intersect.

The Commission, in speaking of railroad associations, says:

"But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also because *the same policy was likely to be beneficial to both.*

"The result necessarily is that a classification made by a railroad association represents a series of compromises, *to which not only the railroads are parties, but in a certain sense business interests and sections of country also; thesein many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views.*"

1 An. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, *the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.*"

Wholesale Prices, Wages & Transportation, Part I., p. 404.

Judge Severens is therefore in error, when he states that traffic officers, in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party and have everything their own way."

LXXI.

Railroads do not and Cannot "Even Up Their Profits" by Increasing Local Rates.

In the case at bar, Judge Severens says:

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other carriers *to a point which is not in itself remunerative*, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul, *as shall make good their lack of profit in competitive business*, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

Trans. pp. 375, 376.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge states so "roundly."

I have hereinbefore stated what I regard as the limitations which may be reasonably imposed upon carriers in exercising the right to take into consideration competition as one of the circumstances and conditions affecting transportation; and one of the limitations suggested by me was, that the rates accepted by carriers on traffic to the longer distance competitive point *must yield some profit* (though it may be very small) over the additional cost of the movement of that traffic. The limitation is directly opposed to the idea that carriers "may engage in a competitive struggle" . . "*to a point which is not in itself remunerative.*" If the rates accepted to the longer distance competitive point yield *any* profit over *the additional cost of the movement of that traffic*, they are "remunerative" to some extent, though the remuneration may be very slight.

Another of the limitations suggested by me was, that the rates charged by the carriers to the shorter distance point must not be unjust or unreasonable, within the purview of the first section of the Act. If it be necessary that those rates shall be just and reasonable, within the purview of the first section, it is impossible for the carriers "to turn back on the line," and "take advantage of the conditions existing at such points."

If the rates to the shorter distance points be in fact just and reasonable, the carriers, in charging them, are in no sense "taking advantage" of the persons who pay them.

If the rates charged by the carriers to the longer distance competitive points be remunerative to any extent, however small it may be, there is no "*loss*" sustained by the carriers in the transportation of the longer distance traffic; and therefore there is no occasion for them to "even up" by increasing their shorter distance rates.

If Judge Severens means that railroads must charge at competitive points the same rate of profit as is charged at non-competitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon non-competitive traffic as low rate of profit as they may be forced to accept upon competitive traffic, then the Southern railroads must

go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at certain competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles. I have already considered this subject and I will not repeat what I have hereinbefore said upon it.

LXXII.

The "Average Receipts Per Ton Per Mile" on a Road Cannot be Used as a Standard of Reasonableness for the Rates of That Road on any Particular Traffic.

"The average receipts per ton per mile" is ascertained by dividing the "total freight revenue" of a railroad by the "number of tons carried one mile."

In order to ascertain the "number of tons carried one mile," it is necessary to keep an account of the actual distance each ton is carried. Each ton is then multiplied by the number of miles it is carried, so as to get its equivalent in tons carried one mile; and the aggregate of the equivalents in tons carried one mile shows the "number of tons carried one mile."

Of course, in actual practice, no one ton of freight is ever carried exactly one mile, and the "number of tons carried one mile" is made up of thousands or millions of shipments of different kinds of freight, carried over the different parts of the line, and carried different distances. It is made up of costly silks carried all the way from New York to Nashville; and of cheap limestone rock carried five miles from some quarry to a furnace.

It is of no more value in determining what are reasonable rates on the six classes of traffic from New York to Chattanooga, than the fact that the earth is the equivalent of a certain number of grains of sand would be in ascertaining the reasonable price of a tombstone.

The "total freight revenue" of a company is ascertained by adding together the freight charges on thousands or millions of shipments, made under various conditions and circumstances. Some shipments consist of single packages, weighing perhaps less than 100 pounds. Other shipments are made in quantities of more than 100 pounds, but less than carloads; others are made in car load quantities; and others in train load quantities. Some of the freight shipped is very light and bulky, and of considerable value per ton; other freight consists of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over long distances; and others over the entire length of the road. The freight charges per ton, per mile, necessarily vary within wide limits, from 8 or even 10 cents per ton, per mile, on first class freight, carried over only a few miles of the road between local stations, to 3½ mills per ton, per mile, on long-haul coal and mineral traffic, and long distance competitive traffic. And, as stated above, it is by dividing the "total freight revenue" by the "number of tons carried one mile" that we ascertain the "average receipts per ton per mile."

As neither the divisor nor the dividend has the slightest relation to the reasonableness of rates, the quotient can have no relation to it.

One might as well divide the number of spikes in a railroad track by the number of cross-ties, and expect the quotient to show what are reasonable rates for each of the six classes of traffic between any two given points.

The "average receipts per ton per mile" of a road is of value, however, to show the proportion which the high-class traffic bears to the low-class traffic of a road.

The tonnage and rates of a road remaining the same, its "average receipts per ton per mile" will increase as the proportion which its high-class traffic bears to its low-class traffic increases.

To demonstrate this fact mathematically, let us assume that the tonnage of any given road is equivalent to 2,000,000 tons

carried one mile, in each of three consecutive years. During the first year, let us assume that one-fourth of the tonnage was class 1, and carried at 5 cents per ton; and that three-fourths of the tonnage was class 6, and carried at 1 cent per ton. We have:

500,000 tons of class 1 at 5 cents.....$25,000
1,500,000 tons of class 6 at 1 cent..... 15,000

Or, 2,000,000 tons at 2 cents.....$40,000

which shows that the "average receipts per ton per mile" was for the year, 2 cents.

During the second year, let us assume that one-half of the tonnage was class 1, and carried at 5 cents per ton; and that the other half was class 6, and carried at 1 cent per ton. We have:

1,000,000 tons of class 1 at 5 cents..... .....$50,000
1,000,000 tons of class 6 at 1 cent 10,000

Or, 2,000,000 tons at 3 cents..... .....$60,000

which shows that the "average receipts per ton per mile" was, for the second year, 3 cents.

During the third year, let us assume that three-fourths of the tonnage was class 1, and carried at 5 cents per ton; and that the remaining one-fourth was class 6, and carried at one cent per ton. We have:

1,500,000 tons of class 1 at 5 cents.....$75,000
500,000 tons of class 6 at 1 cent..... 5,000

Or, 2,000,000 tons at 4 cents.....$80,000

which shows that the "average receipts per ton per mile" was for the third year, 4 cents.

We see that, though the tonnage remained the same, and though the rates charged on class 1 and class 6, respectively, remained the same, during all three of the years, the "average receipts per ton per mile" for the third year was double what it was for the first year; and we see that it increased precisely as the proportion which the high-class traffic bore to the low-class traffic increased. But the proportion which the high-class traffic of a road may bear to its low-class traffic does not throw any light, whatever upon the reasonableness of its rates, either on the high-

class or the low-class traffic. So, the fact that the rates charged on classified traffic from New York to Chattanooga over the appellants' lines pay more than "the average receipts per ton per mile" of those lines, only proves that the New York traffic is of a higher class than other classes of freight, in the carriage of which those lines participate. The traffic carried by the appellants from New York, Boston, etc., to Chattanooga, consists of dry-goods, boots and shoes and other high-class traffic, which is properly charged higher rates than those which the appellants are forced to accept upon their low-class traffic, which consists of coal, iron ore, limestone, etc., the great volume of which, as compared with the volume of appellant's high-class traffic, necessarily reduces their "average receipts per ton per mile."

LXXIII.

The Average Receipts Per Ton Per Mile of One Road Cannot be Used as a Standard of Reasonableness for the Rates of Another Road.

In the last preceding section of this argument I have shown that the "average receipts per ton per mile" of any particular road cannot be used as a standard of reasonableness for the rates of *that* road on any particular traffic; and, a fortiori, it cannot be used as a standard of reasonableness for the rates of *other* roads.

Appellee filed as evidence in this case a certain tabulated statement compiled by the "Interstate Commerce Commission, Division of Statistics, October 20, 1897." Said statement shows the "average receipts per ton per mile," and the "estimated cost of carrying one ton one mile" for the years 1892 and 1893; and the "average receipts per ton per mile" for the years 1894, 1895 and 1896 of the Louisville & Nashville Railroad; Nashville, Chattanooga & St. Louis Railway; Cincinnati, New Orleans & Texas Pacific Railway; Pennsylvania Railroad; New York, New Haven & Hartford Railroad; Pittsburg, Cincinnati, Chicago & St. Louis Railway; Fitchburg Railroad; West Shore Railroad; Lake Shore & Michigan Southern Railway; Cleveland, Cincinnati, Chicago & St. Louis Railway; New York, Chicago & St.

Louis Railroad; New York Central & Hudson River Railroad; Cumberland Valley Railroad; New York, Philadelphia & Norfolk Railroad; East Tennessee, Virginia & Georgia Railway; Norfolk & Western Railroad; Richmond & Danville Railroad; Western & Atlantic Railroad; Central Railroad & Banking Co. of Ga.; Georgia Railroad & Banking Co.; Atlanta & West Point Railroad; Southern Railway and the Western Railway of Alabama.

Trans. p. 257.

I suppose that one object in filing said statement was to institute a comparison between the "average receipts per ton per mile" of the railroads referred to therein, and the receipts per ton per mile realized by the appellants from the carriage of traffic from New York and other Eastern cities to Chattanooga; and from that comparison to deduce an argument that the rates charged by appellants on said traffic are unreasonably high, in and of themselves.

It will be noticed that among said railroads are the New York, New Haven & Hartford Railroad, and the Norfolk & Western Railroad; and it will also be noticed that the "average receipts per ton per mile" of the former was very much higher than the average receipts per ton per mile of the latter. That fact demonstrates that the proportion which the high-class traffic carried by the former bore to the low-class traffic carried by it, was very much greater than the proportion which the high-class traffic carried by the latter bore to the low-class traffic carried by it. The fact is easily accounted for, when we remember that the New York, New Haven & Hartford Railroad is located in New England, and carries a large amount of dry-goods, boots and shoes, and other high-class traffic; while the Norfolk & Western Railroad is located in a mining country, and carries a large amount of low-class mineral traffic. The disparity between the "average receipts per ton per mile" of those two roads, while it proves a corresponding disparity between the proportion of high-class and low-class traffic carried by them, respectively, has no tendency whatever to prove either that the rates charged by the New York, New Haven & Hartford Railroad on its high-class

traffic are too high, or that the rates charged by the Norfolk & Western Railroad on its low-class traffic are too low.

An examination of said statement will show that the "average receipts per ton per mile" are subject to constant fluctuations even on the same road.

As the Commission had access to the reports of all the interstate railroads in the United States, it is fair to assume that in making up a statement which was intended to furnish a basis for an argument, those roads would be selected which are most useful for the purpose; and yet an examination of said statement will show that though it includes 23 railroads, the "average receipts per ton per mile" of no one of said railroads was the same for any two of the five years covered by said statement.

The "average receipts per ton per mile" of the Louisville & Nashville Railroad varied from $\frac{806}{1000}$ of a cent in 1896, to $\frac{941}{1000}$ths of a cent in 1892; that of the Nashville, Chattanooga & St. Louis Railroad varied from $\frac{920}{1000}$ths of a cent in 1895, to 1.035 cents in 1896; that of the Pennsylvania Railroad varied from $\frac{562}{1000}$ths of a cent in 1896, to $\frac{647}{1000}$ths of a cent in 1892; that of the New York, New Haven & Hartford Railroad varied from 1.570 cents in 1896, to 1.747 cents in 1892, etc.

An examination of said statement will show that, with only one exception, the "average receipts per ton per mile" was not the same on any two of said 23 railroads in any year covered by the statement.

The stability of rates is of greater importance than even the reasonableness of rates; and yet if the "average receipts per ton per mile" is to be used as a standard of reasonableness, it is manifest that the rates will be as fluctuating as the standard by which they are measured.

Again, it must be evident to every one that an arbitrary standard such as the "average receipts per ton per mile" cannot be used for fixing *competitive* rates.

In the case of Business Men's Association, etc., vs. C. St. P. M. & O. R. R. Co., 2 Interstate Commerce Rep. p. 41, it was

said by the Commission that "the method of testing the freight rates of a railroad by the rate *per ton per mile*, is one by which these rates may be brought down to the narrowest point of scrutiny, and in this sense is valuable, *but it is like looking at them with a microscope*, for it ignores all other tests except that which it alone furnishes, *and does not take into consideration any of the surrounding circumstances and conditions that enter into the making of the rate, no matter how compulsory or imperious these may be, and for this reason it cannot be considered a controlling rule in determining the reasonableness of rates.*"

Said statement, referred to above, shows that for the year 1896 the "average receipts per ton per mile" of the Pennsylvania Railroad was 563-1000 of a cent. This seems to be a very low rate; but we must remember that it is a rate for only one mile."

The distance from New York to Chicago is 900 miles; and a rate of 563-1000 of a cent per ton per mile would amount to 25 cents per hundred pounds for the 900 miles from New York to Chicago. Said statement also shows that for the year 1896 the "average receipts per ton per mile" of the New York Central & Hudson River Railroad was 668-1000 of a cent per ton per mile; and that rate would amount to 30 cents per hundred pounds for the 900 miles from New York to Chicago.

The Pennsylvania Railroad and the New York Central Railroad are in competition between New York and Chicago, and if the rates of each road are to be fixed in proportion to its "average receipts per ton per mile," the rate of the Pennsylvania Railroad from New York to Chicago would be 25 cents per hundred pounds, while the rate of the New York Central Railroad would be 30 cents per hundred pounds. With a difference of five cents per hundred pounds against it, the New York Central Railroad would, upon certain classes of traffic, be driven out of competition.

In the case of *competitive* traffic, carriers cannot make their rates upon arbitrary formulæ, however plausible or attractive they may appear.

A carrier must accept the same rates as are offered by its competitor, although they may not be in proportion to the "average receipts," per ton per mile.

LXXIV.

The Value of a Thing Cannot be Ascertained by Applying, as a Measure, the Average Value of a Number of Dissimilar Things, Which Differ Greatly in Value as Compared with Each Other, and as Compared with the Thing That is to be Measured.

The "average receipts per ton per mile" represents the average received per ton per mile by a railroad for the transportation of hundreds of thousands or millions of shipments, made under varying conditions and circumstances. As stated above, some shipments consist of single packages, weighing, perhaps, less than one hundred pounds; some shipments are made in carload quantities; and some in train load quantities. Some of the freights are very light and bulky, and of considerable value per ton. Others consist of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over longer distances; and others over the entire length of the road. The freight receipts per ton per mile necessarily vary within wide limits, from eight or even ten cents per ton per mile on first-class freight carried over only a few miles of the road, to three and one-half mills per ton per mile, and even less, on long haul coal and mineral traffic.

No country merchant who keeps in his store a great variety of articles, differing greatly in value, would undertake to ascertain his "average receipts" per pound, or per yard, and to sell all of his goods to his customers at a certain profit over and above his "average receipts." He would find plenty of customers for his dry goods, but none for his coffee and sugar.

The average of the lives of a thousand men or women would

be of value in constructing tables for insuring human lives; but the average of the lives of a thousand animals of different kinds, whose longevity differs widely, would be of no value in constructing tables for insuring human lives; or for insuring the life of any animal of any one of the thousand classes included in the average. In fact, *the average of a number of dissimilar things is absolutely misleading as to any one of them.*

It is stated in Edison's Encyclopedia, p. 201, that the duration of life of certain animals, etc., is estimated to be as follows:

The Whale	1,000	years.
The Swan	200	"
The Elephant	100	"
The Goose	80	"
The Lion	70	"
The Beaver	50	"
The Hawk	40	"
The Horse	30	"
The Cow	20	"
The Monkey	18	"
The Squirrel	7	"
The Wren	3	"
The Bee	½	"
The average of the above is	124½	"

An insurance company might use the average with safety in insuring an elephant for 124 years; but it would not do so in the case of a bee.

It will be noticed that the average does not represent the duration of life of any one of the thirteen animals, etc., mentioned above.

It is stated by the Commission in its Eleventh Annual Report (1897), p. 66, that the classifications now in use in this country embrace from 5,000 to 7,000 items; and when we remember that those items are transported by the railroads in varying quantities for varying distances, and under varying circum-

stances as to speed, etc., etc., it must be evident that an average of the receipts realized from the transportation of so many different articles, under so many differing conditions, must be positively misleading in ascertaining what is a reasonable rate for transporting any one of those articles for any given distance.

The sixth section of the Act to Regulate Commerce requires every common carrier subject to its provisions to file with the Commission copies of its schedules of rates. With those schedules, and with the classifications which govern them, it is practicable for the Commission to compile a table showing the rates charged by each of said carriers upon each of the articles covered by the classifications, and for each of the distances over which the article may be carried. From such tables it might be shown what is the average rate received per ton per mile on each of those articles by all the railroads in this country. And though the conditions under which different railroads operate vary widely, there might be some plausibility in insisting that the average receipts per ton per mile realized by all the railroads in this country from the transportation of a given article, as for instance bituminous coal, should be taken as presumptive evidence of the reasonableness of that rate, wherever the matter might be drawn in question. But the "average receipts per ton per mile" relied upon in argument by counsel for the Commission is not the "average receipts per ton per mile" *of any given article, or of any given class of freight, or even of all classified freight*, but it is an average of each and every article and commodity (whethclassified or not) that may be carried by a railroad, however dissimilar in nature those articles and commodities may be.

LXXV.

The Use of the "Average Receipts" as a Standard in Rate Making Would, by Successive Repetitions, Reduce All Rates to Zero.

The official classification contains six classes, numbered from 1 to 6. Let us assume that the rates charged by a certain railroad, for a certain distance, on the several classes, are, in cents per 100 pounds, as follows:

On Class 1.....6 cents
On Class 2.....5 cents
On Class 3.....4 cents
On Class 4.....3 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of said rates is 3.5 cents. If the average of rates is to be taken as the standard of reasonableness, the rates on the first three classes would be too high, inasmuch as they exceed the average; and, in revising the tariff, the new rates would be as follows:

On Class 1..... 3.5 cents
On Class 2..... 3.5 cents
On Class 3..... 3.5 cents
On Class 4..... 3 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.75 cents; and again using the average as a maximum, the second revision would stand as follows:

On Class 1.....2.75 cents
On Class 2.....2.75 cents
On Class 3.....2.75 cents
On Class 4.....2.75 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.33 cents; and again using the average as a maximum, the third revision would stand as follows:

On Class 1.....2.33 cents
On Class 2.....2.33 cents
On Class 3.....2.33 cents
On Class 4.....2.33 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.05 cents; and again using the average as a maximum, the fourth revision would stand as follows:

On Class 1.....2.05 cents
On Class 2.....2.05 cents
On Class 3.....2.05 cents
On Class 4.....2.05 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 1.86 cents.

The foregoing illustrations are sufficient to demonstrate that if the average of rates is to be the standard of reasonableness, all rates above the average must be adjudged to be too high, and be reduced so as not to exceed the average; that at each revision the average is necessarily reduced; and that it requires only a certain number of revisions to reduce all of the rates to zero.

LXXVI.

If the "Average Receipts Per Ton Per Mile" Could be Used at all in Rate Making, it Could Only be Used in Connection With Other Things; and Even Then it Could be Used Only in Judging of the Reasonableness of the Schedule as a Whole.

I have hereinbefore shown that in determining the reasonableness of the rates of a company, its operations "as a whole" must be considered; and that it is impossible to determine the reason-

ableness of the rates upon a particular article, or upon a particular portion of the traffic carried by a company, without considering what its rates are on the other articles, or on the other portions of traffic carried by it.

The contention of counsel for appellee, however, is that if the "revenue per ton per mile"—i. e., "the average receipts per ton per mile" is useful, in connection with other things, in determining whether appellants' rates "in general" are excessive, it must be useful to some extent, even by itself, in determining whether the rates on that portion of appellants' traffic which moves from New York to Chattanooga are excessive.

It would be equally logical to contend that if a certain factor, in connection with others, may enable us to solve a certain equation, the same factor will, in the absence of others, enable us to solve any part of the equation.

If you ask a company engaged in manufacturing gas, what it costs to produce a ton of coke, its reply must be that "this depends on what the public will pay for the gas." And if you ask the company what it costs to produce a thousand cubic feet of gas, its reply must be that "this depends on what the public will pay for the coke."

The working expenses of the whole operations of the company are so much. The result of those operations is the output of a certain quantity of gas and a certain quantity of coke. But you cannot say what is a reasonable rate to be charged for the gas until you know what rate the company can obtain for the coke; and you cannot say what is a reasonable rate to be charged for the coke, until you know what rate the company can obtain for the gas. If the company can obtain such rates for the gas as will enable it to approximate a fair return on its investment, it can afford to accept exceedingly low rates on the coke.

Now take, on the other hand, a company engaged in manufacturing coke for neighboring blast furnaces. It can use, in

heating its coke ovens, a certain quantity of gas which is produced in making the coke, but no more; and for the remainder of the gas produced the company has probably no market at all. In this case, evidently, the coke must be looked to as the main reliance to earn a fair return on the investment, and the most that can be expected of the gas is that it shall help, in some slight degree, to lighten the burden.

In the case of a railroad company, the results of its operations *as a whole* are the transportation of a certain number of passengers, a certain quantity of mail and express matter, and a certain number of tons of freight; and to those operations, *as a whole*, it must look for a reasonable return upon the fair value of its investment.

What is denominated "local traffic" is affected by competition between product and product, and competition between "market and market."

What is denominated "competitive traffic" is affected not only by competition between product and product, and competition between market and market, but also by competition between carrier and carrier. And competition between carrier and carrier affects rates differently where there is a marked difference in the circumstances of the competing carriers.

In the case of one railroad company, only one-fourth of its traffic may be "local," and the remaining three-fourths "competitive:" while, in the case of another company, the proportions may be exactly reversed.

Whatever may be the proportions which the "competitive traffic" bears to the "local traffic" of a company, the company must, of necessity, accept such rates on its "competitive traffic" as its rivals may offer; and if the revenue derived from its "competitive traffic" fails to pay a reasonable return upon the value of the investment, the deficit must be made up by increasing the rates on the "local traffic"—if it be possible. And if

competition between product and product, or between market and market, or the action of a State Railroad Commission prevents an increase in the rates on the "local traffic" the company must cease operation.

In the case of a railroad company, as in the cases of the gas company and the coke company, referred to above, you must look to the operations of the company *as a whole*, and before you can decide whether the rates charged upon one source of revenue are reasonable, you must ascertain what amount can be realized by the company from its other sources of revenue.

We see, therefore, that while such data as the "revenue per ton per mile," i. e., the "average receipts per ton per mile," "might" possibly be useful, in connection with other things, in determining whether the rates of a company "in general" are excessive, it is of no value whatever in determining the reasonableness of rates charged on any particular portion of the traffic carried by the company.

In other words, as hereinbefore shown, in order to determine whether the rates of a railroad company are reasonable, *its operations as a whole* must be considered.

LXXVII.

The "Estimated Cost of Carrying One Ton One Mile" On a Road Cannot be Used as a Standard of Reasonableness for the Rates of that Road on any Particular Traffic.

The "estimated cost of carrying one ton one mile" is ascertained by dividing the total expenses "assignable to the freight service" by the "number of tons carried one mile."

I have hereinbefore shown how to ascertain the "number of tons carried one mile." But it has been found impracticable to invent any satisfactory method of determining what proportion

of the total expenses of a railroad are properly "assignable to the freight service," as contradistinguished from the passenger service, the mail service, the express service, etc.

The total expenses of a railroad company are made up by adding together the expenses of—

1. Maintenance of way and structures;
2. Maintenance of equipment;
3. Conducting transportation;
4. General expenses;
5. Fixed charges.

There are ten subdivisions of expenses classified under "Maintenance of way and structures."

There are nine subdivisions of expenses classified under "Maintenance of equipment."

There are twenty-seven subdivisions of expenses classified under "Conducting transportation."

There are seven subdivisions of expenses classified under "General expenses," and

Four subdivisions of expenses classified under "Fixed charges."

See Classification of Operating Expenses as prescribed by the Commission, taking effect July 1, 1894.

It appears from the Fourth Annual Report on the "Statistics of Railways in the United States," for the year ending June 30, 1891, pp. 392, 393 and 438, that the expenditures of all the railways of the United States, which made reports to the Commission, were as follows:

For Maintenance of Way and Structures	$153,671,576	
For Maintenance of Equipment	117,047,895	
For Conducting Transportation	384,385,458	
For General Expenses	75,926,707	$ 731,887,893
Fixed Charges (p. 438)		326,886,541
Total Operating Expenses and Fixed Charges		$1,058,774,434

of which, 65.31 per cent. is assignable to "operation," and 34.69 per cent. is assignable to "fixed charges."

In order to ascertain the "estimated cost of carrying one ton one mile," it is necessary to apportion the items of expense assignable to "operation" between the passenger, mail, and express service, on the one hand, and the freight service on the other.

No rational basis for such an apportionment can be established in respect to a large number of those items.

For example: The expenses of repairs of roadway, repairs and renewals of bridges and culverts, repairs and renewals of fences, and repairs and renewals of telegraph, etc., etc., etc., have no known relation to the volume of passenger or freight traffic. Those expenses are not materially affected by the volume of traffic, either passenger or freight.

The above are only a few of very many of the items that cannot be properly apportioned between the passenger and freight traffic.

The Commission, having become convinced of the futility, not to say absurdity, of the attempt to apportion the expenses between the freight and passenger service, no longer requires railroad companies to go through the form of making such apportionments in their reports to the Commission. Such apportionments were required of the companies at the time this case was heard before the Commission, but since 1893 the Commission has not required the companies to make any such apportionments.

See Statistics of Railways, (1893), p. 81

The reason why it is impossible to apportion with accuracy the cost of service among the items of traffic is thus stated by the Commission In Re Southern Ry. & S. S. Association, sometimes cited as In Re L. & N. R. R.:

"First of all, when it is undertaken, there must be an appor-

tionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small, some perishable or of a special value and requiring peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would, at the best and under the most favorable circumstances, only reach an approximation *This is so well understood, the world over, that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of the carriage solely have always been abandoned after investigation.*"

1 Interstate Commerce Rep., p. 282, right col.

But if the cost could be ascertained, it could not be used as a rate-making factor. Upon this subject the Commission says:

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, within small bulk or weight, concentrate great value, would, on that system of making them, be absurdly low; low

when compared to the value of the article, and perhaps not less so when the comparison was with the value of the service in transporting them."

1 An. Rep., I. C. C. (1887), p. 30.

I have hereinbefore shown that an arbitary standard, such as the "average receipts per ton per mile," cannot be used for fixing *competitive* rates; and the same is equally true of the arbitrary standard styled the "estimated cost of carrying one ton one mile."

By reference to the tabulated statement filed as evidence by the appellee, and which is hereinbefore referred to, it will be seen that for the year 1893 the "estimated cost of carrying one ton one mile" on the Pennsylvania Railroad was 447-1000 of a cent, which, for the 900 miles from New York to Chicago, amounts to 20 cents per hundred pounds. The "estimated cost of carrying one ton one mile" on the New York Central Railroad during the same year was 514-1000 of a cent, which, for the 900 miles from New York to Chicago, amounts to 23 cents per hundred pounds.

Trans. p. 257.

If the rates of each of said roads are to be fixed in proportion to the "estimated cost of carrying one ton one mile," the New York Central Railroad must charge 3 cents per hundred pounds more than the Pennsylvania Railroad from New York to Chicago; and such a difference in rates would, upon certain classes of traffic, drive the New York Central Railroad out of competition.

LXXVIII.

Freight Rates are Governed by Commercial Laws, and Cannot be Constructed According to Mathematical Formulæ.

One of the chief errors into which the Commission has fallen in attempting to fix rates for carriers, as well as in attempting to

judge of the rates fixed by carriers, is in supposing that rates can be constructed according to certain mathematical formulæ; that some kind of an equation can be invented, in which certain statistical data can be arranged as factors, and that by the solution of such equations it can be ascertained what are reasonable rates on any given article of freight, for any given distance, on any given railroad. Among the factors which it has attempted to use in constructing such equations have been the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "average distance haul of one ton;" the "freight earnings per train mile," etc. But neither one, nor all, of such factors can be used in the practical business of rate-making."

Rates of freight are subject to the commercial law of supply and demand. Competition between rail lines and water lines; competition between product and product, and competition between market and market, are the factors which must govern railroad companies in the establishment of tariffs. No railroad freight tariff, not even local freight tariff, can now be established arbitrarily by a railroad company. In fact, as I have stated above, it cannot be said that railroad companies make their rates at all, at the present time. All that they can now do is to adjust them, from time to time, to the surrounding conditions and circumstances as they may exist; and no regard can be paid to any kind of mathematical formulæ, or scientific theories.

In Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import case," this Court quotes from Wills, Judge, the following:

"I first observe that these are, in my judgment, eminently *practical* questions, and if this Court once attempts the hopeless task of dealing with questions of this kind *with any approach to mathematical accuracy* and tries to introduce a precision *which is unattainable in commercial and practical matters*, it would do infinite mischief and no good."

162 U. S., p. 225, T. & P. Ry. Co. vs. I. C. C.

This Court also quotes from Lord Herschell as follows:

"I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents, or is equivalent to, such a fraction of a penny difference of charge, in the one case, as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at, etc."

162 U. S., pp. 227, 228, T. & P. Ry. Co. vs. I. C. C.
73 Fed. Rep., p. 421, I. C. C. vs. L. & N. R. R.
74 Fed. Rep., p. 721, I. C. C. vs. Ala. Mid. Ry. Co. et al.

LXXIX.

The Testimony of Expert Witnesses That the Chattanooga Rates are Reasonable.

The following named witnesses, all of whom are experts in traffic matters, testify that, in their opinion, the rates from New York and other Eastern cities to Chattanooga are just and reasonable:

Van den Berg. Trans. p. 131.
Guillaudeu. Trans. p. 143.
Davant. Trans. p. 153.
Culp. Trans. p. 159.
Brown. Trans. pp. 184, 185.
Lutz. Trans. pp. 188, 189.
Winburn. Trans. p. 193.
Knox. Trans. p. 197.
Biles. Trans. p. 214.

The reason given by the witnesses for their opinions are, among others, the following:

They are not higher than rates to surrounding points similarly situated.

Winburn. Trans. p. 193.
Lutz. Trans. pp. 188, 189.

They compare favorably with other rates for similar distances and services in the same territory.

Knox. Trans. p. 197.

They do not allow the carriers exorbitant revenue for the service performed.

Knox. Trans. p. 197.
Winburn. Trans. p. 193.

They are lower than would be charged by any other means of transportation.

Culp. Trans. p. 159.

They are the result of competition; though the competition has not been such as to reduce them as low as the Nashville rates.

Culp. Trans. p. 167.

Until this proceeding was instituted, no shipper had ever questioned their reasonableness.

Davant. Trans. p. 153.

They have been in effect for a long time, and are the outgrowth of years of experience and careful adjustment.

Davant. Trans. p. 153.

They are reasonable when measured by the service performed, the volume of traffic moved, and the rates to all other points similarily situated.

Guillaudeu. Trans. p. 143.

They are in line with the rates to Knoxville, Rome, Atlanta

and Dalton and other points doing business in competition with Chattanooga.

Culp. Trans. p. 159.
Van den Berg. Trans. p. 131.
Guillaudeu. Trans. p. 143.
Brown. Trans. p. 185.
Winburn. Trans. p. 193.
Knox. Trans. p. 197.
Biles. Trans. p. 214.

Property has moved freely under them, and business has been done under them at a profit.

Culp. Trans. p. 159.

It will be noticed that the reasons given by said witnesses for their opinions are eminently practical; and such as commend themselves to any one who considers rate-making as a commercial rather than a mathematical problem. And I submit that the plain, practical, commercial reasons given by said witnesses for their opinions are of infinitely more value than the mathematical calculations attempted by the Commission; and in which the Commission has attempted to use such statistical factors as the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "number of tons carried one mile;" the "average distance haul of one ton;" the "freight earnings per train mile," etc., etc.

In the cases of the Interstate Commerce Commission vs. the Western & Atlantic Railroad Company, et al., decided by the Fifth Circuit Court of Appeals on March 21, 1899, cases which involved the same questions as are involved in the case at bar, the Court, in speaking of the reasonableness of the rates in controversy in those cases, says:

"The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant (the Commission) in the Circuit

Court tending to show that the rates, separately considered, to the respective points, are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses, called by the appellees (the Railroad Companies), do not show or tend to show that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony, given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gives as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts), ... that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And another witness says the rates are 'just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any other means of transportation. They have not prevented the shipment of freight. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated.' . . . . . These reasons do not convince the counsel for appellant (the Commission), but appear to us to have weight."

93 Fed. Rep. pp. 88, 89, I. C. C. vs. W. & A. R. R. Co.

LXXX.

Misconstruction Placed by Appellee's Counsel Upon Certain Testimony by Appellants' Witnesses as to the Reasonableness of the Nashville Rates.

Counsel for appellee, in his argument in the Court below, referred to certain statements made by appellants' witnesses on cross-examination. One of said statements was as follows:

"Q. (62). The haul from New York to Nashville is 151 miles longer than the haul to Chattanooga, is it not?"

"A. Yes, sir."

"Q. (63). Is the .91 cents rate to Nashville reasonable in and of itself?"

"A. I think so."

Trans. p. 138.

"Q. (67). Is a rate reasonable which does not yield the carrier a *proper* remuneration over and above *the cost of service?*"

"A. I do not believe carriers make rates below the *cost of transportation.* I would consider such a rate as unreasonably low."

"Q. (68). It would not then be a reasonable rate unless it yielded a *proper* remuneration over and above *the cost of service?*"

"A. It would be an unreasonably low rate."

Trans. p. 139.

Another of said statements was as follows:

"Q. (6). . . . . Are those rates to Nashville also reasonable, in and of themselves, in your opinion?"

"A. Yes, sir."

Trans. p. 186.

"Q. (9). Is a rate reasonable, in and of itself, which does not yield the carrier a *proper* remuneration over and above *the cost of service of carriage?*"

"A. I would say not. If carried for less than cost, it would be unreasonably low."

Trans. p. 186.

Another of said statements was as follows:

"Q. (3). Are the lower rates for the haul of 151 miles further, through to Nashville from New York and Boston, also, in your opinion, reasonable, in and of themselves?"

"A. Yes, sir; they are reasonable; brought about by active water competition to that point."

"Q. (4). Do these rates to Nashville yield the carrier a revenue in excess of *the cost of transportation?*"

"A. Yes, sir; I believe they do."

"Q. (5). Is a rate reasonable, in and of itself, which does not yield the carrier a *proper* remuneration over and above *the cost of service of carriage?*"

"A. No. I would not consider it a reasonable rate, if it did not yield the carrier sufficient revenue over and above *the cost of transportation.*"

Trans. pp. 189-190.

Upon such testimony, counsel for the appellee argued that if the Nashville rates yield the carrier "a *proper* remuneration," or "sufficient revenue," over and above "*the cost of service of carriage*," or "*the cost of transportation*," and if those rates are reasonable, in and of themselves, the higher rates charged to Chattanooga must yield the carrier an *excessive* "remuneration" over and above "*the cost of service of carriage*," or "*the cost of transportation*," and must, therefore, be unjust and unreasonable in and of themselves.

The argument, while plausible, is unsound. It assumes that there can be but two classes of rates, i. e., those which are "unreasonably low" and those which are "unreasonably high;" and that every rate must take one or the other of those classifications. It might as well be said that if the ocean is not at low tide, it must be at high tide; or it might as well be said that if the water in a river is not low, it must be high. In speaking of the tides, we have "high tide," "low tide," "mean tide," "spring tide," "neap tide," etc., with various gradations between them. So, in speaking of the stage of water in a river, we speak of "extreme high water," "low water," "extreme low water," etc.; and between "extreme high water" and "ex-

treme low water" there are as many gradations as there are fractions of an inch in the difference between the two. So a rate may be "high," "higher," or "very high;" or it may be "low," "lower," or "very low." It may be "low" without being "*unreasonably* low;" or it may be "high" without being "*unreasonably* high."

The argument also assumes that "a *proper* or *sufficient* remuneration over and above *the cost of service of carriage*," or "*the cost of transportation*," must refer to some *definite, fixed* per cent. of remuneration; and that any remuneration over or under that *fixed* per cent. must necessarily be *im*proper or excessive; but the phrase "*proper* or *sufficient* remuneration" is as flexible as the phrases "reasonable rate," "high tide," "low tide," "high water," "low water," etc.

Though a merchant may realize a "*proper* or *sufficient* remuneration" over and above the cost of a handkerchief when he sells it for 25 cents, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should sell its duplicate for 30 cents; so, though a farmer may realize a "*proper* or sufficient remuneration" over and above the cost of raising cotton when he sells a part of his crop at 7 cents per pound, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should sell the remainder of his crop at 9 cents per pound.

So, though the carriers in these cases may realize a "*proper* or sufficient remuneration over and above *the cost of the service of carriage*," or "*the cost of transportation*," from the rates charged to Nashville; and though they may realize a somewhat greater "remuneration over and above *the cost of the service of carriage*," or "*the cost of transportation*," from the rates which they charge to Chattanooga, the remuneration realized from the latter may be as "proper" as that which is realized from the former.

Mr. Winburn, in answer to a question whether, in his opinion, a rate is a reasonable rate "which does not yield the carrier

a proper remuneration over and above the *cost of the service of carriage*," said:

"That depends on what we call a *proper* remuneration above *the 'cost of the carriage.'* It seems to me there are a great many cases where a rate would be reasonable if it was above the *cost of carriage to any extent*, dependent largely upon the movement of traffic in different directions."

Trans. pp. 193, 194.

Mr. Culp said: "In my opinion a road is always justified in taking additional traffic, or traffic which it otherwise could not get, to the extent of making a rate as low as *the actual movement expense incurred in the movement of that traffic.*

Trans. p. 165.

Speaking of the Nashville rates, Mr. Culp said: "They might be higher and still be not unreasonably high. They might be as high as the rates to Chattanooga, and no doubt would be, if the lines through Chattanooga (working through Chattanooga) could alone fix the rates. But they meet competition around the other way—competition via the Ohio River.

Again he said: "I answer that they are above the additional *cost of transportation; that is to say, the actual movement expense of this particular traffic. . . . . They pay more than actual movement expense* incurred in the movement *of this particular traffic.* That is to say, the expense incurred as between moving this traffic and not moving this traffic."

Trans. p. 165.

Mr. van den Berg, speaking of the Nashville traffic, said: "I do not mean remunerative traffic, but traffic that pays over and above *the cost of handling it.*"

Trans. p. 138.

Mr. Lutz said: "There are times when we accept certain freight that we would not accept at other times. I will take the

local freight (train), for instance, that will run between Atlanta and West Point. That train has got to run. We have got to pay the engineer and we have got to pay the crew; and by adding on probably one or two more cars, or something of that kind, it probably would not add to the cost of the train but very little more."

Trans. p. 190.

The phrase, "*cost of service of carriage*" and the phrase "*cost of transportation*," as used by the witnesses, refer to the "*cost of movement of the particular traffic*;" and they do not include "*the fixed charges of the road*."

The distinction between "*the cost of movement* of the particular traffic" and the "whole cost of operation," which includes "*the fixed charges* of the road," as well as the operating expenses, is thus stated by the Commission in its First Annual Report, in commenting upon rates on long haul traffic: "By this, however, is meant only *the cost of movement of the particular traffic*, leaving out of view the *fixed charges of the road*, which must, in any event, be provided for, whether the long haul traffic is or is not taken. This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. . . . . The *fixed charges* of the road may, for the purposes of illustration, be assumed to equal one-half of the whole (cost of operation), *the cost of movement* of freight the other half. The rates made were doubtless calculated to cover the whole (cost of operation), with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now comes this new business, and, from the nature of the case, low rates are a necessity to it; it can pay perhaps little, if anything, more than half what is paid by other traffic. But taking it will not increase perceptibly the *fixed charges* of the road, because those are made up of items that must be paid, whether the traffic is large or small. What is added to the cost by taking it (the traffic) is simply the expense *of its own handling and move-*

ment; and, upon the supposition made, there might perhaps be gain to the road, instead of loss, in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. *It might, therefore, be carried at such rates without wrong to any one.*"

1 Annual Rep., I. C. C. (1887), p. 73.

To the same effect is the testimony of Mr. Culp, who said: "Now, there may be average cost, or estimated cost, *including fixed charges*; there is the cost which leaves out the fixed charges and takes (in) all other kinds of expense; then there is a *cost which pertains simply to the movement of a particular business*, (i. e.) a cost which is incurred only because that particular business is moved."

Trans. p. 165.

Mr. Culp, in speaking of the Nashville rates, said:

"I answer that they are above the additional *cost of transportation;* that is to say, the *actual movement expense of this particular traffic*, although they might be higher and still be not unreasonably high. . . . . They pay more than the actual *movement expense* incurred in the moving of this particular traffic. That is to say, *the expense incurred as between moving this traffic, and not moving this traffic.*"

Trans. p. 165.

When the witnesses say that the Nashville rates "yield the carriers a *proper* remuneration over and above *cost of the service of carriage*, or "*the cost of transportation*," they use those phrases as equivalent to the phrase "*the cost of movement*," which does not include "the fixed charges of the road."

It is manifest, however, that though the Nashville rates may pay a proper remuneration over and above "*the cost of movement*," or "*the cost of transportation*," the carriers would be justified in increasing them until they would also pay a proper remuneration over and above "*the fixed charges*," and they would doubtless increase them, if the Trunk Line competition at Nashville would permit.

LXXXI.

The Court of Appeals Based its Affirmance on the Fourth Section of the Act.

The Court of Appeals says:

"We conclude that the defendants are violating the *fourth* section of the Act in charging a higher rate from New York and other Eastern cities to Chattanooga than to Nashville. The order that enjoined them from doing so is therefore right. The decree of the Circuit Court affirming the order of the Commission is affirmed with costs."

Trans. p. 415.

I have hereinbefore shown that the Commission based its order exclusively on the fourth section (see ante p. 32); the Circuit Court based its judgment upon the third and fourth sections (Trans. p. 380); but the Court of Appeals, like the Commission, based its judgment upon the fourth section alone.

It follows that the first section, which relates to the reasonableness of rates, and the second section, which relates to unjust discrimination, are not properly before this Court for consideration.

LXXXII.

The Error of The Court of Appeals in Holding That Competition at Chattanooga is Stifled.

The Court of Appeals says:

"The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize as a condition justifying discrimination against one locality, competition

at a more distant locality *when competition at the nearer point is stifled or reduced,* not by normal restrictions, *but by agreement between those who otherwise would be competing carriers.* The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called Federal Anti-trust Act (citing cases). Certainly such a difference in conditions ought not to justify a difference in rates before the Commission or the Court."

Trans. pp. 412, 413.

The Commission found and reported that the rates from New York to Chattanooga, and twenty-four other Southern cities with which Chattanooga is grouped, "are established by the Southern Railway & Steamship Association, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association."

Trans. p. 48.

The report of the Commission was filed December 30, 1892.

Trans. p. 37.

The Southern Railway & Steamship Association went out of existence and was succeeded by the Southern States Freight Association on or about October 21, 1895.

Trans. p. 168.

The case of the United States vs. Trans-Missouri Freight Association (166 U. S., 290) was decided by this Court on March 22, 1897, and on May 1, 1897, the Southern States Freight Association disbanded, and the Southeastern Freight Association was organized.

Trans. p. 168.

The articles of association under which the Southeastern Freight Association was organized will be found on p. 218 of the Transcript. Said association was organized "for the purpose of interchanging authentic information in regard to the tariffs of the respective parties," members thereof; and "for consultation

and mutual advice in regard to the reasonableness of tariffs and the publicity ofthe same."

Trans. p. 218.

The fourth article provides that a Conference Committee shall be constituted consisting of a traffic officer of each company. "Each company *reserving always to itself the right to take independent action on any subject*, agrees that any change in rates, rules or regulations affecting the traffic within the territory of the association proposed to be made by any company, shall be submitted to said Conference Committee by the company proposing to make such changes *for consideration and exchange of views* at least three days before the same shall take effect."

Trans. p. 219.

The ninth article provides that "nothing herein shall be so construed *as to establish or otherwise affect rates on freight traffic.*"

Trans. p. 220.

The second article provides that "the association shall be managed by an Executive Board, *which shall have no power to bind the members of the association to observe any regulation in restraint of trade.*

Trans. p. 219.

It is manifest upon the face of said articles that they were carefully prepared to comply in good faith with the decision of this Court in the Trans-Missouri case.

The Southeastern Freight Association has no power whatever to *make* freight rates; on the contrary it is expressly provided in said article that it shall have no power "to establish or otherwise affect rates on freight traffic."

Trans. p. 220.

Said association has no power whatever to *maintain* freight rates; on the contrary, it is expressly stipulated in said article that the Executive Board shall have no power to bind the *members* "to observe any regulations in restraint of trade," and that each

member "reserves to itself the right to take independent action on any subject."

Trans. p. 219.

The only provision in regard to making or maintaining freight rates is that each company agrees that three days before any change of rates which it may propose to make shall take effect, it will submit the same to the Conference Committee "for consideration and exchange of views"; but after such "consideration and exchange of views" are had, the company reserves the right "to take independent action" on the subject, and it may accept or reject the views or wishes of its associates, without violating any provision of the articles of the association; and without subjecting itself to the censure of its associates.

This Court has never decided that it is illegal or contrary to public policy for competing carriers to submit to each other their proposed changes in rates for "consultation and advice," where the carrier proposing the change reserves to itself the right to disregard the advice if it sees proper to do so.

The preamble to said articles declares that said association is organized for the purpose, among others, "of interchanging authentic information in regard to the tariffs of the respective parties."

Trans. p. 218.

The eighth article provides that the chairman shall "receive from the members of the association copies of any joint tariff or rate established by said members," and "compile, print and distribute such tariffs in conformity with the Interstate Commerce Act, and other laws;" that "the rules governing the filing of freight tariffs with the Interstate Commerce Commission shall apply as to filing all tariffs with the chairman;" and that the parties "shall file with the chairman all tariffs they may issue."

Trans. p. 220.

The tariffs which the members agree to file with the chairman of the association are the same as those which the sixth sec-

tion of the Act to Regulate Commerce requires, shall be printed, posted, and filed with the Interstate Commerce Commission.

The chairman of the association could obtain copies of them from the Commission; but it saves time and expense to file copies with the chairman, at or before the time that they are sent to the Commission.

One of the objects of the law in requiring tariffs to be printed, posted and filed, is to enable the competitors of a carrier to ascertain what rates are charged by it; and there can be no legal objection to competing carriers agreeing to furnish to each other information to which the law entitles them.

This Court has never held that it is illegal, or improper, for competing carriers to agree to furnish each other with copies of their tariffs, so long as there is no obligation imposed upon them to maintain such tariffs for any specified time, and so long as each of them reserves the right "by independent action" to change its tariff at any time, upon giving the notice prescribed by law.

The fifth article provides that "it shall be the duty of the chairman to discourage a reduction in rates by rebate, or drawback, or by payment of commissions, or by underbilling weights, or by any illegal device whatsoever, and upon complaint that such practices are being resorted to (he) shall make an investigation thereof, reporting the result to the Executive Board."

Trans. p. 219.

To enable the chairman to detect such illegal devices, the fifth article provides that the chairman and his representatives "shall be given access to all records of the companies that pertain to the traffic subject to the association." Trans. pp. 219, 220; and the ninth article provides that the Executive Board "shall report to the Federal and State Commissions any reduction in rates by any illegal device whatsoever."

Trans. p. 220.

The "illegal devices" which the chairman is directed to discourage are the same as those which are denounced by the second section of the Act to Regulate Commerce.

The sixth section of the Act provides that when a common carrier shall have established and published its rates, it shall be unlawful for it to charge any person a greater or less compensation than is specified in such published schedule of rates, so long as the same may remain in force.

The competitors of a carrier, as well as the public, are interested in seeing that the published rates of such carrier are charged so long as they remain in force; and the competitors, as well as the public, are interested in discouraging all secret rebates, or other illegal devices, by which a carrier may vary from its published schedule, so long as the same may remain in force.

This Court has never held that it is illegal, or improper, for competing carriers to agree to discourage "illegal devices" resorted to for the purpose of secretly reducing their published rates, so long as each of them reserves the right by independent action to reduce its rates publicly, by giving the notice prescribed by law.

I contend, with the utmost confidence, that there is nothing illegal or improper in the articles of the Southeastern Freight Association.

There is absolutely nothing in said articles to prevent any one of the appellants from reducing its rates from New York to Chattanooga whenever it may see proper to do so. Since said articles were signed, viz., May 1, 1897, there has been absolutely no agreement, either express or implied, which obligates the appellants or either of them to maintain the present rates, or any other specified rates, from New York to Chattanooga.

Prior to the decision of this Court in the Trans-Missouri case, and while the Southern Railway & Steamship Association was in existence, the rates from New York to Chattanooga were made and maintained by and under an agreement similar to the

one which this Court, in that case, held to be illegal; but since said decision, and since the Southeastern Freight Association has been in existence, there has been no agreement whatever to make or maintain rates. The fact that each of the appellants has continued to charge the same rates from New York to Chattanooga as were charged before said decision was made, is due alone to the fact that each of the appellants believes that said rates are just and reasonable in themselves, and that they do not give to Nashville any undue preference over Chattanooga.

I deny, therefore, that competition is stifled at Chattanooga by agreement between the appellants, as was erroneously held by the Court of Appeals.

I have shown in section LVI. that competition does in fact exist at Chattanooga; and that though it has not resulted in making the rates to Chattanooga as low as the rates to Nashville, it has resulted in making the Chattanooga rates very much lower than they would be if there were no competition at that point.

LXXXIII.

Even were it True That the Chattanooga Rates are Maintained by Agreement, the Fact Would not Preclude the Appellants from Accepting the Nashville Rates.

If it were true that appellants are operating under an agreement to maintain certain rates at Chattanooga, and to maintain certain lower rates at Nashville, a farther distant point, it might be claimed with some force, that they are responsible for both sets of rates, and therefore responsible for the relation which exists between them.

But while it is claimed that appellants are operating under an agreement to maintain certain rates at Chattanooga, it is not pretended that they are operating under any agreement in regard to the Nashville rates. It is perfectly well-known that it is im-

possible for the appellants to maintain by agreement, or otherwise, any specified rates at Nashville.

The Commission itself reports that appellants "have no voice" in determining the Nashville rates; that the Trunk Lines, in connection with the Louisville & Nashville R. R. established the Nashville rates "long before" the appellants "engaged in the Nashville business;" and the acceptance of the Nashville rates, so fixed by the Trunk Lines, is the "necessary condition" upon which the appellants can "compete for Nashville traffic."

Trans. p. 49.

As the appellants are compelled to accept the Nashville rates, as fixed by the Trunk Lines, and as it is impossible for appellants to increase the Nashville rates, it is wholly immaterial whether the Chattanooga rates are maintained by agreement between the appellants, or by their several and independent action.

It is only where the same carriers have the power to make both sets of rates that the existence of an agreement between them, to maintain certain rates at the shorter distance point, could be fairly urged as a reason for precluding them from accepting lower rates at a longer distance point.

LXXXIV.

The Error of the Court of Appeals in Construing My Argument as Contending that the Mere Existence of a Rate is a Justification of it.

The Court of Appeals says:

"It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of conditions in the face of such a rate. This is only one of many arguments advanced on behalf of appellants which, reduced to their last analysis, involve as a major premise, that the existence of a rate and movement

of business under it are a complete justification of it and foreclose judicial investigation."

Trans. p. 412.

I do contend that where competition exists at one point, and no competition exists at another point, no amount of argument can demonstrate a similarity of conditions between those two points; but whether competition does or does not exist at either point, is a question for the Commission and the Courts.

I have never contended that the "mere existence of a rate and movement of business under it are a complete justification of it;" or that they "foreclose judicial investigation." On the contrary, I have always conceded that the Commission and the courts may investigate and determine whether competition exists at the longer distance point, whether it is actual, effective, and in good faith; whether it is such as to subserve the interests of the public, and of the carriers; whether the competitive rates pay more than the additional cost of movement; whether the shorter distance rates are reasonable, in and of themselves; and generally, that the Commission and the courts may investigate and determine any question of law or fact that may be involved in the controversy. I have never claimed that the mere existence of a rate is conclusive of anything in regard to its legality.

LXXXV.

The Error of the Court of Appeals in Stating that the Louisville & Nashville R. R. Co. Jointly Operates the Georgia Central Railroad & Banking Company's Road.

The Court of Appeals says:

"Nor can it be said that the Louisville & Nashville Company, whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants, and is offered as a motive for its low rates to Nashville, is not a party to the plan by which Chatta-

nooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her. For through its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company, operating a road from Nashville through Chattanooga to Atlanta, *its joint operation of the Georgia Central & Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company*, of which the Georgia Central Company owns all the stock, it is very largely interested in traffic from the Eastern Seaboard to Chattanooga, and through Chattanooga to Nashville, and necessarily exercises an influence in shaping the action of the Southern Traffic Association in fixing rates. By its consent to the discrimination against Chattanooga it only furthers its purpose to favor Nashville, for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city."

Trans. p. 414.

It is true that the Louisville & Nashville R. R. Co. owns a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company; and that the latter company operates a road from Nashville, through Chattanooga, to Atlanta.

At the time the answers in this case were filed in the Circuit Court, the Louisville & Nashville R. R. Co., and the "Central Railroad & Banking Company of Georgia," as assignees of a lease jointly operated the road of the "Georgia Railroad & Banking Company," which latter road extends from Atlanta to Augusta.

Trans. p. 87.

The Court of Appeals confounded the "Central Railroad & Banking Company of Georgia" with the "Georgia Railroad & Banking Company."

The Louisville & Nashville R. R. Co. did jointly operate the road of the "Georgia Railroad & Banking Company"; but said road only extends from Atlanta to Augusta, and it does not

reach Savannah at all. The "Georgia Railroad & Banking Company" does not own any of the stock of the Ocean Steamship Company.

The "Central Railroad & Banking Company of Georgia" does own a railroad from Atlanta to Savannah, and it also owns all the stock of the Ocean Steamship Company, whose steamers ply between Savannah and New York.

The "Central Railroad & Banking Company of Georgia," through its ownership of the stock of said steamship company, controls a rail and water route from Atlanta to New York; and if the Louisville & Nashville R. R. Co. did, in fact, control the "Central Railroad & Banking Company of Georgia," the L. & N. R. R. Co. would control an important trunk line which would reach from Cincinnati via Nashville, Chattanooga, Atlanta and Savannah to New York, and such a line would exercise great influence in Southern traffic matters.

But the Louisville & Nashville R. R. Co. has never jointly, or severally, operated any portion of the road of the "Central Railroad & Banking Company of Georgia;" nor has it ever had any connection with the Ocean Steamship Co. There is not a scintilla of evidence in opposition to this averment; and the finding of the Court of Appeals to the contrary is a mistake, pure and simple.

The Louisville & Nashville R. R. has no ownership or control of any road east of Augusta. It does not reach the Atlantic Seaboard at any point; and of course it does not reach New York.

The materiality of the error of the Court of Appeals consists in this. If the Louisville & Nashville R. R. Co did in fact operate the road of the "Central Railroad & Banking Company of Georgia," which company owns the stock of the Ocean Steamship Company, the L. & N. Co. would control an unbroken line extending all the way from New York via Savannah, Chattanooga and Nashville to Cincinnati. It could (if we concede for

argument that ownership of majority of stock gives absolute control of operation) fix its own rates from New York to Nashville, as well as from New York to Chattanooga, without consulting any one; and if it possessed that power it might be held responsible for the relation which exists between those two sets of rates. But as the L. & N. R. R. does not control any road north of Cincinnati, nor east of Augusta, it cannot reach New York at all. It cannot fix the rates even from New York via Cincinnati to Nashville; because in making the rates which it accepts from New York, via Cincinnati to Nashville, it is compelled to use such rates as the Northern Trunk Lines see proper to charge from New York to Cincinnati.

And if the Louisville & Nashville R. R. Co. were to attempt to make rates from New York, via Augusta, to Chattanooga it would be compelled to use such rates as the lines east of Augusta saw proper to charge from New York to that point.

LXXXVI.

The Error of the Court of Appeals in Supposing that There is a Plan in Existence to Deprive Chattanooga of Her Natural Advantages.

The Court of Appeals accuses the Louisville & Nashville R. R. Co. of "being a party to the plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her."

Trans. p. 414.

The Court af Appeals states that eight railroads enter Chattanooga.

Trans. p. 408.

It states that Chattanooga has "at least three through competing Southern lines from New York under different managements."

Trans. p. 413.

It states that the Southern Railway, (which is one of the most powerful corporations in the South) owns one line which extends from Chattanooga to Bristol; and thence forms lines all rail through Hagerstown or Alexandria, or rail and water via Norfolk; and another line which extends from Chattanooga to Atlanta, where it connects with numerous lines via the South Atlantic ports.

Trans. p. 408.

The L. & N. R. R. Co. has no interest in, or control over, any one of the eight railroads which enter Chattanooga, except that it owns a majority of the stock of the Nashville & Chattanooga Railway, which operates the Western & Atlantic Railroad under a lease.

None of the remaining six railroads which enter Chattanooga enter Nashville, or are in any wise interested in Nashville's success as a city. On the contrary, as between Nashville and Chattanooga the interests of said six railroads would naturally incline them to prefer Chattanooga.

It is absolutely ridiculous to suppose that those six railroads (which include the powerful Southern Railway) would permit the Louisville & Nashville R. R. Co. to deprive Chattanooga of "the natural traffic advantages which her railroads and her situation ought to give her."

If, as the Court of Appeals states, Chattanooga has "three competing Southern lines from New York under different managements," either one of these three lines can, at any moment, if it desires to do so, reduce the rates from New York to Chattanooga, so as to make them not higher than the Nashville rates; and the Louisville & Nashville R. R. would be powerless to prevent it, even if it were disposed to do so.

LXXXVII.

The Error of the Court of Appeals in Supposing that the Louisville & Nashville R. R. Co. is Actuated by a Desire to Favor Nashville to the Detriment of Chattanooga.

Speaking of the Louisville & Nashville R. R. Co., the Court of Appeals says: "By its consent to the discrimination against Chattanooga it only furthers its purpose to favor Nashville, for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city."

Trans. p. 414.

As the Louisville & Nashville R. R. Co. has no voice in making the rates from New York to Chattanooga, it cannot be justly charged with any discrimination that may arise from the fact that certain specified rates exist at that point.

In making rates from New York, via Cincinnati, to Nashville, while the Louisville & Nashville R. R. Co. did adjust them so as to enable Nashville to compete with Louisville and Evansville in the territory north and west of Nashville, the Louisville & Nashville R. R. Co. was not actuated by any desire to injure Chattanooga. Such injury as may have resulted to Chattanooga was merely incidental to an adjustment of rates which the Louisville & Nashville R. R. Co. had the perfect right to make in order to protect one of its terminal cities against other cities with which it competed. The Court of Appeals thinks that Chattanooga has the right to compete with Nashville in the territory north and west of Chattanooga; and if that be so, Nashville has the right to compete with Louisville and Evansville in the territory north and west of Nashville.

The rates from New York to Louisville and Evansville are now materially less than the rates from New York to Nashville (Trans. p. 42); and if the L. & N. R. R. Co. had not made the

adjustment of rates to Nashville upon the present basis, it would have been impossible for Nashville to have competed in the territory north and west of her.

If, as the Court of Appeals concedes, "the Interstate Commerce Law was intended to encourage normal competition," how can the object of the law be attained unless each and every railroad be allowed to make such rates to and from the cities and towns located upon its lines, as will enable them to compete successfully with rival markets located upon rival lines?

The competition which has existed between our numerous rail lines, where each one of them has attempted to promote the interests of its own cities and towns, has contributed more than all other causes combined to the improvement and development of this country as a whole.

LXXXVIII.

The Error of the Court of Appeals in Supposing that Chattanooga Ought to be Given Northern Rates.

The Court of Appeals says:

"The business of the East and West Trunk Lines north of the Ohio River is so great that the rates of freight in force on them are generally much lower (perhaps 33⅓ per cent.) than those in force on the Southern lines, which embrace, generally, all lines in the States south of the Ohio and east of the Mississippi."

Trans. pp. 404, 405.

"The Louisville & Nashville Railroad Company, though a Southern line, has put in force from Cincinnati to Nashville, a distance of 295 miles, the Trunk Line rates, so that freight rates on merchandise coming to Nashville by way of Cincinnati are substantially less than they would be were the usual Southern rates of freight charged from Cincinnati to Nashville."

Trans. p. 405.

"Chattanooga is 330 miles from Cincinnati, with which it is connected by the Cincinnati Southern Railway, under lease to the Cincinnati, New Orleans & Texas Pacific Railway Company. The latter does not charge East and West Trunk Line rates on through business from New York to Chattanooga, but fixes its rates according to the Southern tariff, though they are less than the local rates, and in this way Chattanooga rates from the East through Cincinnati are maintained on a Southern basis."

Trans. p. 405.

Again the Court says: "The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the North and East to be made the first city of importance to bear the heavier burden of Southern rates, when Nashville, her natural competitor, is given Northern rates. The line of division between Northern and Southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it."

Trans. p. 405.

As business in the Trunk Line territory, north of the Ohio River, is very much greater than it is in Southern territory, it is evident that Southern railroads cannot, *as a general rule*, work for as low rates as the Northern railroads can afford to accept.

I have heretofore shown that the L. & N. R. R. Co. was forced to make Nashville an exception to the general rule, and accept Northern rates from Cincinnati to Nashville on New York traffic, in order to prevent Louisville and Evansville from driving Nashville out of competition in the territory north and west of Nashville.

The Court of Appeals thinks that the Cincinnati, New Orleans & Texas Pacific Railway ought to make a similar exception in the case of Chattanooga, and accept Northern rates from Cincinnati to Chattanooga, on New York traffic, so as to prevent Nashville from driving Chattanooga out of competition in the territory north and west of Chattanooga.

It is manifest, however, that if the C., N. O. & T. P. Ry. should act as suggested by the Court, and reduce the rates from New York via Cincinnati to Chattanooga to the same as the Nashville rates, all of the Southern lines which carry New York traffic to Chattanooga must accept whatever rates the C., N. O. & T. P. Ry. might fix. Whether New York traffic were carried all rail via Hagerstown through Bristol to Chattanooga, or all rail via Alexandria through Atlanta to Chattanooga, or water and rail through Norfolk, Charleston, Savannah or Brunswick, and thence to Chattanooga, each and all of those Southern lines would be forced to accept the same rates from New York to Chattanooga as might be fixed by the C., N. O. & T. P. R'y. via Cincinnati. In a word, all of those Southern railroads would be forced to carry New York traffic to Chattanooga at Northern rates.

Again: the Court of Appeals concedes that Chattanooga is grouped with twenty-four Southern cities and towns which take the same rail and water rates as Chattanooga on New York traffic.

Trans. pp. 405, 406.

If the Southern lines be forced by the C., N. O. & T. P. Ry. to accept Northern rates on New York traffic to Chattanooga, they must accept the same rates from New York to the twenty-four cities and towns with which Chattanooga is grouped. The result would be to force the Southern lines to accept Northern rates on all traffic from New York and other North Atlantic cities destined to any interior point in Southern territory.

The solitary exception which the Louisville & Nashville R. R. Co. was forced to make in the case of Nashville would become the general rule for Southern rate making; and rates all over the South would be reduced to the level of Northern rates.

"The line of division between Northern and Southern rates" must be drawn somewhere.

The carriers who represent opposing interests have thought that the line ought to be drawn north of Chattanooga. The

numerous and powerful rail lines which enter Chattanooga, and which are willing and able to protect her as against Nashville, or any other city, do not believe that they can reduce the Chattanooga rates unless they also reduce the rates to the cities and towns with which she is grouped; and as that would practically necessitate a reduction of all rates in Southern territory to the level of Northern rates, they do not feel that they ought to be required to make such an enormous sacrifice of revenue.

LXXXIX.

The Error of the Court of Appeals in Supposing that the Cincinnati, New Orleans & Texas Pacific Railway is Under Agreement Not to Lower its Rates from New York to Chattanooga.

The Court of Appeals says:

"The Cincinnati, New Orleans & Texas Pacific Railway has been a member of this association (i. e. an association of the Southern Railway and Steamship Companies), and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of the New York rate. Without such an agreement it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville."

Trans. p. 413.

I have hereinbefore shown that the Southern lines, immediately after the decision of this Court in the Trans-Missouri case, and without waiting for the decision in the Joint Traffic Association case, promptly dissolved the association which had previously existed, and formed a new one which complies in all respects with the law as announced in those cases.

Since May 1, 1897, the C., N. O. & T. P. Ry. has not been under any agreement with any one to maintain any specified rates from New York to Chattanooga. It is at perfect liberty to

reduce them at any moment, by its "independent action," upon giving the notice required by law.

The reason why the C., N. O. & T. P. Ry. does not reduce its rates from New York to Chattanooga is this: If the New York rates to Chattanooga be reduced the twenty-four cities and towns with which Chattanooga is grouped must have as low New York rates as Chattanooga.

The C., N. O. & T. P. Ry., through its connections, carries traffic to all of those cities and towns, and her loss of revenue on that traffic would be very great.

The C., N. O. & T. P. Ry., through its connections, also carries traffic to many other cities and towns located in different parts of the Southern territory; and it is vitally interested in preventing a general reduction of rates throughout the Southern territory to the level of Northern rates.

An intelligent consideration of its own interests has induced the C., N. O. & T. P. Ry. to continue, by its independent action, a policy which is the only one that will save it from great financial loss. Respectfully submitted,

ED BAXTER,
of Counsel for Appellants.

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